March 3, 2000

CLETP Students:

Let me welcome you to the Federal Law Enforcement Training Center Legal Division's Continuing Legal Education Training Program. This program has served the Federal law enforcement community for over ten years and our feedback indicates that this is considered some of the finest legal training offered.

The Legal Division is pleased to be able to offer you this training but it is only available because of sacrifices made by many parties. First, your agency has acknowledged that it must do without your services for a week while you refresh your legal skills. Second, the instructors have put a great amount of effort in ensuring you obtain the latest information in a variety of areas. And last but not least, your sacrifice is greatly appreciated. The warm responses we have received over the years to the CLETP is in no small part due to the desire of the students to reconnect and rejuvenate their legal knowledge.

This book is designed to serve you in the classroom and in the field. The material is laid out to facilitate a rapid inquiry into various legal questions that may arise. If you feel that there is something we have failed to address or that would make this book a better resource in the future, we welcome your input. This course is, after all, the product of comments from senior federal law enforcement officers operating in the field. Your observations will improve the program.

The CLETP is available to agencies in the field. We are happy to bring the law to you. If you would like to continue to stay abreast of the latest legal information, you can access the *Quarterly Review*, which is published by the Legal Division in August, November, February and June. You can access the *Quarterly Review*, members of the Legal Division, future dates for CLETPs, the Search and Seizure Source Book, and other useful resources at our web page (www.ustreas.gov/fletc/legal/legal_home.htm).

Enjoy the program and spread the word.

Dan Duncan
CLETP Coordinator

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CONTINUING LEGAL EDUCATION TRAINING PROGRAM

TABLE OF CONTENTS

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LAW ENFORCEMENT OFFICER LIABILITY

DESCRIPTION:

This two-hour course will identify the bases of liability of federal law enforcement officers and agents; types of conduct that establish liability; sovereign immunity; qualified immunity; the Federal Tort Claims Act; the Federal Employees Liability Reform and Tort Compensation Act of 1988; the Federal Law Enforcement Officers' Good Samaritan Act of 1998; and will examine Bivens v. Six Unknown Named Agents of Federal Bureau of Narcotics.

TERMINAL PERFORMANCE OBJECTIVE:

Students will determine if there is a cause of action against an individual officer or agent, or an agency allowed by the Federal Tort Claims Act or the Bivens case.

INTERIM PERFORMANCE OBJECTIVES:

1. Recognize the four elements establishing a cause of action for a negligent tort.

2. Recognize the requirements for individual immunity under the Federal Tort Claims Act.

3. Recognize the effect of the Federal Employees Liability Reform and Tort Compensation Act of 1988, and the Federal Law Enforcement Officers' Good Samaritan Act of 1998.

4. Recognize a constitutional tort and identify the legal doctrine of Bivens v. Six Unknown Named Agents of Federal Bureau of Narcotics.

5. Recognize the elements of qualified immunity.

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LAW ENFORCEMENT OFFICER LIABILITY

TABLE OF CONTENTS

LAW ENFORCEMENT OFFICER LIABILITY

I. INTRODUCTION

In an ever increasingly litigious society, the prospect of being accused of negligently injuring someone or violating their rights is a real possibility. This course is designed to improve your knowledge about your potential for civil liability and ways to diminish the possibility of being sued. Nothing can make you "judgment proof" but adhering to the principles discussed here can go a long way toward avoiding civil liability.

The civil liability of a federal law enforcement officer is predominantly an issue of tort law. A tort is a civil wrong, other than breach of contract, for which the court provides a remedy in the form of a lawsuit to recover damages.

Since there is no general federal law of torts, civil suits against the federal government and its employees are conducted in accordance with the appropriate state tort law, even though the action is in federal court. The laws of the 50 different states vary widely, with some being much more liberal in imposing liability than others. Some state laws impose greater responsibilities on law enforcement officers than do the laws of other states. Since federal officers may travel to different states in the course of an investigation and may be transferred occasionally during their careers, it is important to understand the state laws of liability. However, many protections for federal law enforcement officers (and all United States Government employees) are found in the Federal Tort Claims Act, the Federal Employees Liability Reform and Tort Compensation Act, and the Federal Law Enforcement Officers' Good Samaritan Act of 1998. Congress has intended that these laws will encourage federal law enforcement officers to perform their duties without the necessity of constantly considering the consequences of that conduct under state tort law.

Tort actions against the federal government and its employees can be classified as common law torts (torts recognized under English common law) or as constitutional torts (torts based on a violation of the United States

Constitution; often called Bivens actions). The traditional common law torts are:

- Ë Negligence
- Ë Intentional torts (such as battery, assault, and false imprisonment)
- Ë Quasi-intentional torts (such as defamation, invasion of the right to privacy, malicious prosecution, and abuse of process)
- Ë Strict liability torts (such as occur when engaging in ultra-hazardous activities).

This text will consider only the most frequent types of liability officers and agents encounter: negligent torts, intentional torts and constitutional torts.

II. NEGLIGENCE

For a federal law enforcement officer, negligence is the most important of the common law torts since plaintiffs bring most suits for injuries that occur because of a government employee's negligence. The elements of an action for negligence are:

- Ë *Duty of care*
- Ë *Breach of duty*
- Ë *Causation*
- Ë *Damages*

A. Duty of Care

The general rule is that the officer owes a duty only to *foreseeable* plaintiffs. If a defendant owes a duty of care to someone, the basic standard of care

required is that of an objective "reasonable person." The basic question in a negligence action is, "What would a reasonable person have done in the defendant's position?"

Sometimes, however, special standards will apply, and the law may require a person to exercise care beyond that which the public would expect of an ordinary "reasonable person." For example, professionals (e.g., surgeons, airline pilots) are required to possess and exercise the knowledge and skill of a member of their profession in good standing. In such cases, the fundamental question becomes, "What would a reasonable *professional* have done in the defendant's position?"

IPO 1 - Recognize the four elements establishing a cause of action for a negligent tort.

Generally, there is no affirmative duty to act. That is, the law does not usually require that people intercede, even in situations in which they could prevent property damage, injury, or loss of life at no risk to themselves. There are exceptions to this general rule. For example, one who gratuitously acts for the benefit of another, although under no duty to do so, is then under a duty to act as an ordinary, prudent, reasonable person would. To encourage medical professionals to act gratuitously, many states have enacted "Good Samaritan" statutes that exempt licensed doctors, nurses, paramedics, EMTs, etc., who voluntarily render emergency treatment, from liability for ordinary negligence. They are still liable for gross negligence.

Another exception to the general rule that there is no affirmative duty to act arises when the plaintiff's peril results from the defendant's own negligence. In this situation, the law expects the defendant to intervene to aid the plaintiff. Furthermore, in some cases one person has an affirmative duty to control other people.

In a public service context, courts have held that there is no right to basic public services and no requirement that government employees act when members of the public are imperiled (Crider v. United States). Occasionally, a special relationship between a plaintiff and a defendant results in an

affirmative duty to act. In a law enforcement context, this can occur when the police promise to protect the target of a threat or when they assure callers that they are responding to their calls for assistance.

A special relationship also will exist when law enforcement officers have someone in their custody. Government officials do not have a constitutional duty to protect from possible harm from private actors those persons not in their custody. However, once the government takes a person into its custody, restricting the person's liberty, the Fourteenth Amendment imposes a duty to assume some responsibility for the person's safety and general well being (DeShaney v Winnebago). In the DeShaney case the Supreme Court also said that the due process clause of the Fourteenth Amendment does not necessarily transform mere negligence by a government agent into a constitutional violation.

Emerging from several court decisions is a legal concept known as nonactor liability and duty of care. Law enforcement officers are under a constitutional duty to protect persons in custody and have a duty to prevent the use of excessive force by fellow officers/agents. Failure to do so will result in liability to those nonactors who look the other way (Wilson v City of Chicago); (Anderson v. Branen).

B. Breach of Duty

In some situations a breach of duty can be shown by proving that the care exercised was below the standard of care established by custom or usage, although such a showing is not conclusive. Other times showing that the defendant violated a statute can establish a breach of duty that established a standard of care.

A violation of statutory rules of the road by a federal employee in driving a motor vehicle during his or her employment has been held to amount to negligence per se. On the other hand, a violation of a state law may not be negligence per se, but instead may only form prima facie, rebuttable evidence of negligence.

It may also be possible to show that the defendant breached a duty of care because of violations of agency policies and practices. There have been cases where the government and its employees have failed to follow federal statutes or regulations, resulting in negligence per se. However, if the particular statute involved is aimed at protecting the public and does not create a private right, violation of the statute may not be enough to show a recoverable claim against the United States.

C. Causation

There are two ways that conduct may be held to be the cause of the injury or damages: causation in fact and proximate cause. Causation in fact is sometimes called "but for . . . " causation, because it is fairly easy to determine by applying the test, "But for the defendant's breach of duty, would the plaintiff have suffered damages?" If the answer is "yes," then there is causation in fact; otherwise, causation in fact does not exist and the defendant should not be liable.

Proximate cause is a concept intended to address the "ripple in a pond" problem. How far will the effects of a pebble tossed into the pond be felt? At some point, that effect becomes negligible, even though there could still be causation in fact under a strict application of the "but for . . . " test. Proximate cause is intended to limit liability for results that are just too far removed from one's actions.

When the defendant's act is the direct cause of the plaintiff's injury, there is causation in fact, but when the defendant's act is only the indirect cause of the plaintiff's injury, there is proximate cause only if there is no intervening cause that supersedes the original. In such a case, the second action would be the cause of the injury. Causes that are reasonably foreseeable are *not* superseding. These include subsequent medical malpractice, negligence of rescuers, efforts to protect persons or property, "reaction" forces, subsequent disease, and subsequent accident.

Causes that are not reasonably foreseeable or are too remote are superseding, thus precluding proximate causation and relieving the defendant

of liability. Examples of non-foreseeable causes are criminal acts of third persons, intentional torts of third persons, grossly negligent acts of third persons, and acts of God.

D. Damages

Plaintiffs must show that they have suffered either personal injury or property damage. A defendant in a negligence action may assert the defense of assumption of risk; that is, the plaintiff knew what he was getting into and understood the risks involved. He can also assert contributory negligence. The latter defense is often the subject of state statutes, and the effects of a successful contributory negligence defense will vary significantly from one state to another.

III. INTENTIONAL TORTS

A. Elements

To prevail in a suit alleging an intentional tort, the plaintiff must prove three elements:

1. An *Act* (voluntary conduct on the defendant's part);

2. *Intent* (this may be either specific intent or general intent, and in certain cases it can be transferred intent); and

3. *Causation* (the defendant's conduct was a substantial factor in causing the plaintiff's injury).

B. Intentional Torts to the Person:

1. Assault (a reasonable fear in the plaintiff of an imminent harmful or offensive contact to the plaintiff's person (i.e., battery), the apprehension having been created by the defendant).

2. Battery (a harmful or offensive contact to the plaintiff's person by the defendant). Typical are claims of the use of excessive and unlawful force.

3. False imprisonment (the defendant's confining or restraining the plaintiff to a specific area; in certain cases, confining the plaintiff's personal property may lead to a suit alleging false imprisonment). Failure to take a person to an initial appearance "without unnecessary delay" may constitute such a tort.

4. False arrest (actually, a special category of false imprisonment involving the invalid use of the defendant's legal authority to confine the plaintiff).

5. Intentional infliction of emotional distress (the infliction of emotional distress on the plaintiff by a defendant who has engaged in extreme and outrageous conduct), e.g., invasion of privacy.

6. Wrongful death. A death caused by either a negligent or intentional act; e.g., shooting a fleeing misdemeanant; accidental shootings; firing reckless warning shots; shooting to stop a moving vehicle.

C. Available Defenses

1. Consent of the plaintiff.

2. Self-defense and defense of third parties.

3. Public duty.

4. Necessity.

IV. SOVEREIGN IMMUNITY AND THE FEDERAL TORT CLAIMS ACT

Immunity avoids tort liability. The law confers it because of the status or position of the defendant, and is not dependent upon the existence of particular facts in a given case. Sovereign or governmental immunity has its common law roots in the theory that "the King can do no wrong."

When the individual sovereign was replaced by the broader concept of the modern state, the principle of immunity was retained: allowing a suit against a ruling government without its consent was inconsistent with the idea of supreme executive power. In 1821, Chief Justice Marshall ruled that there could be no suit against the United States without its consent, (Cohens v. Virginia).

Thus before 1946, although Congress had authorized the Court of Claims to hear contract cases, and had enacted various other provisions permitting even some actions in tort, the principal way of redressing torts by the government was through special legislation, an unwieldy and often inequitable solution. Shortly after World War II, several disasters involving possible negligence by the government demonstrated the need for a more effective waiver of sovereign immunity.

Congress responded by enacting the Federal Tort Claims Act (FTCA) in 1946. This act makes the United States liable, under the local law of the place where the tort occurs, for the negligent or wrongful acts or omissions of federal employees within the scope of their employment "in the same manner and to the same extent as a private individual under like circumstances." However, the FTCA is not a total abrogation of the doctrine of sovereign immunity.

V. COMMON LAW TORT LIABILITY OF FEDERAL EMPLOYEES

IPO 2 - Recognize the requirements for individual immunity under the Federal Tort Claims Act.

The common law tort liability of federal employees and the federal Government is controlled by the Federal Tort Claims Act (FTCA), as amended. Most of the FTCA is codified in the United States Code, and can be found at 28 U.S.C. § 2671 et seq.

A. The Act

The district courts shall have exclusive jurisdiction of civil actions on claims against the United States for money damages accruing on and after January 1, 1945, for injury or loss of property, or personal injury or death caused by the negligent or wrongful act or omission of any employee of the government while acting within the scope of his office or employment, under circumstances where the United States, if a private person, would be liable to the claimant in accordance with the law of the place [state law] where the act or omission occurred.

B. Application of the Federal Tort Claims Act

1. an injury or loss of property or death occurs;

2. the injury, loss or death is the result of conduct of a government employee;

3. the conduct of the government employee was a negligent or wrongful act or a failure to act (i.e., omission) (but not a criminal act);

4. the act of the government employee occurred while the employee was acting within the scope of his employment;

5. the law of the state where the act occurred imposes liability on a private citizen for such conduct. See Crider v. United States.

C. Non-applicability of the Act

1. claims arising from libel, slander or misrepresentation;

2. claims based on a plea bargain (a breach of a plea bargain is a broken contract and not a tort; FTCA applies only to torts);

3. claims based on misrepresentation, deceit, or interference with contract rights;

4. claims based on a violation of the United States Constitution---unless the same conduct violates the local state law;

5. claims based on breaches of federal statutory duties;

6. As stated by an en banc Fifth Circuit in Johnson v. Sawyer, 1995:

"...the liability of the Unites States under the Act [FTCA] arises only when the law of the state would impose it."

"...even a violation of the United States Constitution, actionable under Bivens, is not within the FTCA unless the complained of conduct is actionable under the local law of the state where it occurred."

"...the FTCA was not designed to redress breaches of federal statutory duties."

"...even where specific behavior of federal employees is required by federal statute, liability to the beneficiaries of that statute may not be founded on the FTCA if state law recognizes no comparable private liability."

"...the FTCA simply cannot apply where the claimed negligence arises out of the failure of the United States to carry out a federal statutory duty in the conduct of its own affairs and is unavailable where the existence or nonexistence of the claim depends entirely upon federal statutes."

"...a federal regulation cannot establish a duty owed to the plaintiff under state law."

"...general state law principles of negligence per se do not suffice to convert a duty created only by federal statute into one owing under state law for purposes of the FTCA's requirement that liability thereunder be that which would be imposed on a private party by state law."

"...all FTCA liability is respondeat superior." "Respondeat superior does not impose liability on the employer [the United States] unless the employee's conduct has been actionable."

D. Definitions

Two of the key definitions are:

- *"Federal agency" - includes the executive departments, the judicial and legislative branches, the military departments, independent establishments of the United States, and*

corporations primarily acting as instrumentalities or agencies of the United States, but does not include any contractor with the United States . . .

- **T** *"Employee of the government" - includes officers or employees of any Federal agency, members of the military or naval forces of the United States, members of the National Guard while engaged in training or duty . . . , and persons acting on behalf of a Federal agency in an official capacity.*

E. Procedural Requirements

Before a plaintiff can sue, there must be a claim submitted to the agency in writing within two years of the cause arising and a denial of the claim by the agency, or the agency failing for six months to act on the claim, which inaction shall be taken to be a denial. In other words, a plaintiff must exhaust all possible administrative remedies before filing suit. (McNeil v. United States).

Acceptance by a claimant of a settlement is final and conclusive, and constitutes a complete release of any claim against the United States and against the employee of the government whose act or omission caused the claim. See McNeil v. United States; Kreines v. United States.

The statute of imitations for a tort claim against the United States is two years.

F. Exceptions Under the FTCA

The federal government has not waived its immunity in all situations. Congress designed the Act to provide a remedy rather than create a substantive right or cause of action. Feres v. United States. While the federal court provides a forum for the lawsuit, the federal court will apply the law of the state where the act occurred.

1. Punitive Damages

The FTCA is not a total abrogation of the doctrine of sovereign immunity. For example, the FTCA provides that the United States will not be liable for punitive damages, and it includes several exceptions to its general rule of tort liability of the United States.

2. Judicial and/or Legislative Immunity

The United States has reserved the right to assert judicial or legislative immunity, as well as any other defense to which it is entitled.

3. Other Claims of Immunity

The United States has also retained immunity regarding any claim based upon:

a. An act or omission of an employee of the government, exercising due care, in the execution of a statute or regulation (even if the statute or regulation is invalid).

b. The detention of any goods or merchandise by any law enforcement officer.

c. Assault, battery, false imprisonment, false arrest, malicious prosecution, abuse of process, libel, slander, misrepresentation, deceit, or interference with contract rights.

G. Amendments to Cover Intentional Torts Committed by Law Enforcement Officers

Congress amended the Act in 1974 to add United States liability for intentional torts but only if a law enforcement officer committed the tort. Congress defined a law enforcement officer as an officer of the United States who had authority to make arrests or execute searches or make seizures of evidence. Thus, the plaintiff could sue the United States for an assault and battery, false arrest, false imprisonment, malicious prosecution or abuse of process, as examples. Yet if the claim is for a violation of constitutional rights, the action would become a Bivens suit rather than proceed under the FTCA.

H. Discretionary Function of Duty

1. Pre 1988: Within Scope of Duties

Before 1988 the FTCA provided that the government was not liable for acts or omissions that were within the "discretionary function or duty" of any federal agency or employee. Thus many courts drew a distinction between government decisions made at the "planning or policy" level (discretionary) for which no tort action could lie against the government and those decisions required by statute in which no freedom of choice was involved, i.e., ministerial duties.

But in either case, individual employees were absolutely immune from personal liability for their acts within the "outer perimeter" of their duties (Barr v. Matteo).

2. After 1988: Within Scope of Duty AND Discretionary

In 1988, the United States Supreme Court held that "absolute immunity does not shield official functions from state law tort liability unless the challenged conduct is within the outer perimeter of an official's duties and is discretionary in nature." (Westfall v. Erwin).

3. The Act

The "discretionary function" exception states that the government is not liable for:

> *any claim based upon an act or omission of an employee of the Government, exercising due care, in the execution of a statute or regulation, whether or not such statute or regulation be valid, or based upon the exercise or performance or the failure to exercise or perform a discretionary function or duty on the part of a federal agency or an employee of the Government, whether or not the discretion involved by abused.*

The Westfall decision left unresolved the precise boundaries of official immunity and the discretion required before immunity may attach. Westfall caused considerable alarm in the federal workforce because it opened the possibility of personal state tort liability for employee's actions taken within the scope of their employment.

4. Discretion Involves an Element of Choice

An employee cannot be performing a discretionary function unless the task involves the opportunity to exercise some element of choice in the decision making. See Berkovitz v. United States; United States v. Gaubert; Weissich v. United States

VI. SUPERVISORY LIABILITY

A. Vicarious Liability: Deliberate Indifference

In some cases, one person may be liable for the negligence of another person. One situation where this occurs is where there is vicarious liability. The term "vicarious liability" refers to liability that is derivatively imposed. This means that one person commits a tortious act against a third party and another person will be liable to the third party for this act. Typically, this

occurs in a master/servant, employer/employee, or principal/agent relationship.

Sometimes the term "respondeat superior" is used to describe the concept that an employer will be vicariously liable for tortious acts committed by the employee if the tortious acts occur within the scope of the employment relationship. Vicarious liability is the basis for the Federal Tort Claims Act.

B. Supervisory Negligence

There is a legal theory similar but unrelated to vicarious liability under which supervisors *can* be liable, and their liability *appears* to result from the acts or omissions of their subordinates. This theory is called supervisory negligence. It is not truly vicarious liability, since it does not actually hold supervisors liable for subordinates' acts or omissions. Instead, it holds supervisors liable for *what the supervisor has failed to do: their own* negligence in failing to properly screen deficient job applicants before hiring them, or in failing to adequately train employees, or in entrusting to employees dangerous devices knowing they are incapable of properly handling them, or in retaining employees after becoming aware that they are unable to adequately perform their jobs, or in failing to provide sufficient guidance and direction to subordinates. Al-Jundi v. Estate of Rockefeller.

C. Failure to Intervene

Supervisors can be held liable if they fail to act to intervene to prevent other law enforcement officers from inflicting injury on a person. Anderson v. Branen. All law enforcement officials have an affirmative duty to intervene to protect the constitutional rights of citizens from infringement by other law enforcement officers. An officer who fails to intercede is liable for the preventable harm caused by the actions of the other officers where that officer observes or has reason to know: (a) that excessive force is being used; (b) that a citizen has been unjustifiably arrested; or, (c) that any constitutional violation has been committed by a law enforcement official.

The court cited other cases taking this view from the 2d, 6th, 7th, 8th and 11th circuits.); see also Wilson v. City of Chicago

D. Protection Afforded by the FTCA

Federal government supervisors, acting within the course and scope of their positions, will not suffer personal liability for their negligent acts as supervisors. This is due to the effect of the Federal Tort Claims Act.

VII. FEDERAL EMPLOYEES LIABILITY REFORM AND TORT COMPENSATION ACT OF 1988 (commonly called the "Westfall Act")

A. Background

In Westfall v. Erwin, the Supreme Court stated that it was " . . . not called on . . . to determine the level of discretion required before immunity may attach." The court also held that " . . . absolute immunity does not shield official functions from state law tort liability unless the challenged conduct is within the outer perimeter of an official's duties and is discretionary in nature." The Court also noted that, "Congress is in the best position to provide guidance for the complex and often highly empirical inquiry into whether absolute immunity is warranted in a particular context. Legislated standards governing the immunity of federal employees involved in state-law tort actions would be useful."

IPO 3 - Recognize the effect of the Federal Employees Liability Reform and Tort Compensation Act of 1988, and the Federal Law Enforcement Officers' Good Samaritan Act of 1998.

The holding in the case prompted Congress to respond, amending the FTCA, by passing the Federal Employees Liability Reform and Tort Compensation Act of 1988 (Public Law 100-694, November 18, 1988, 102 Stat. 4563), in which it found that:

* "Recent judicial decisions, and particularly the decision of the United States Supreme Court in Westfall v. Erwin, have seriously eroded the common law tort immunity previously available to Federal employees."

* This erosion of immunity of federal employees from common law tort liability has created an immediate crisis involving the prospect of personal liability and the threat of protracted personal tort litigation for the entire federal workforce. "The prospect of such liability will seriously undermine the morale and well being of Federal employees, their missions, and diminish the vitality of the Federal Tort claims Act as the proper remedy for Federal employee torts."

B. Purpose

The stated purpose of the new Act was to protect federal employees from personal liability for common law torts committed within the scope of their employment, while providing persons injured by the common law torts of federal employees with an appropriate remedy against the United States. As a result, the law effectively substituted the United States for the federal employee as the defendant in common law tort suits. Also, the law made the FTCA a plaintiff's exclusive remedy for common law torts.

C. The Act

The key provisions of the new Act are codified as 28 U.S.C. § 2679(b)(1):

> *The remedy against the United States for the injury or loss of property, or personal injury or death arising or resulting from the negligent or wrongful act or omission of any employee of the government while acting within the scope of his office or employment is exclusive of any other civil action or proceeding for money damages by reason of*

the same subject matter against the employee whose act or omission gave rise to the claim or against the estate of such employee. Any other civil action or proceeding for money damages arising out of or relating to the same subject matter against the employee or the employees's estate is precluded.

D. Definition: Scope of Employment

"Scope of employment" refers to those acts that are so closely connected with what the government employs the employee to do, and so fairly and reasonably incidental to it, that they may be regarded as methods, even though quite improper ones, of carrying out the objectives of the employment. "Scope of employment" is a very broad concept.

E. Factors in Determining Scope of Employment

1. State law interpreting scope of employment;

2. time, place and purpose of the act;

3. similarity to what is authorized;

4. whether the act is one commonly done by such employees;

5. the extent of departure from normal methods;

6. previous relations between the parties;

7. whether the employer had reason to expect such an act would be done;

8. Usually, the employee's conduct is within the scope of his or her employment if it is of the kind that the

> government employs him or her to perform, occurs substantially within the authorized limits of time and space and is activated, at least in part, by a purpose to serve the employer (i.e., official business motivated the employee).

Notice, however, the above provision will not apply to a civil action against an employee of the government brought for a violation of the constitution of the United States.

VIII. CONSTITUTIONAL TORTS

A. Introduction

1. Civil Rights Act: 42 U.S.C. § 1983

A constitutional tort is essentially the same as an intentional tort but has been raised to constitutional level by the Supreme Court's decision in the Bivens case in 1971. The right to sue for violation of constitutionally protected rights is based on a law originally enacted in 1871, 42 U.S.C. § 1983 ("Civil action for deprivation of rights"), which provides that:

> *Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law*

2. Elements of a Civil Suit under 42 U.S.C. § 1983

a. Deprivation of a right secured by the Constitution or by law;

b. Defendant acted under color of law of a state, territory, or the District of Columbia; and

c. Plaintiff is citizen *or* within United States jurisdiction

B. Civil Suits Against Federal Law Enforcement Officers

1. 42 U.S.C. § 1983 is Applicable ONLY to State and Local Law Enforcement Officers

Since federal officers or agents seldom act under the color of law of a state, territory, or the District of Columbia, they generally are not subject to liability under 42 U.S.C. § 1983. This principle was decided in an action alleging an unconstitutional search and seizure, brought against federal narcotics agents under 42 U.S.C. § 1983. The district court dismissed the suit because the complaint failed to state a cause of action. The court held that the defendants had been acting under color of federal law, not state law, thus making 42 U.S.C. § 1983 inapplicable.

IPO 4 - Recognize a constitutional tort and identify the legal doctrine of Bivens v. Six Unknown Named Agents of Federal Bureau of Narcotics.

The United States Supreme Court reversed, holding that, absent an explicit congressional declaration that persons injured by a federal officer's violation of the Fourth Amendment may not recover money damages from the agents, damages are an appropriate remedy normally available in the federal courts. Thus, if a plaintiff states a cause of action, not under 42 U.S.C. § 1983, but directly under the Fourth Amendment, then the plaintiff is entitled to recover money damages for any injuries suffered because of the agents' violation of the plaintiff's Fourth Amendment rights (Bivens v. Six Unknown Named Agents of Federal Bureau of Narcotics). The practical effect of Bivens is to create an analogy to 42 U.S.C. § 1983, under which federal agents and officers are liable for constitutional torts.

On remand, the Second Circuit Court of Appeals held that federal officers and agents, while in the act of pursuing alleged violators of criminal statutes, have no absolute immunity from damage suits charging violations of constitutional rights. But the appellate court also held that it is a valid defense to such charges to prove that the federal agent or officer acted in good faith and with a reasonable belief in the validity of the arrest and search and in the necessity for carrying out the arrest and search in the way they were done. This recognized a qualified immunity, a concept that courts refined in subsequent decisions and applied to claims of other constitutional violations.

2. Individual Liability for Constitutional Torts

The protection against personal liability for common law torts afforded government employees under the Federal Tort Claims Act (FTCA) *does not* apply in a civil action based on a *constitutional* violation. The Bivens analogy provides a cause of action against *individual* federal officers on a constitutional tort theory.

Since 1971, courts have expanded the constitutional tort concept from Fourth Amendment issues only to include Fifth Amendment Due Process Clause violations (Davis v. Passman) and Eighth Amendment Cruel and Unusual Punishment Clause violations (Carlson v. Green). Also, recent suits have alleged constitutional violations stretching beyond the Fourth, Fifth and Eighth Amendments, but the Supreme Court has not yet extended Bivens into these new areas.

3. Failure to Intervene

A federal law enforcement officer may have a legal obligation to act and intervene to prevent harm to a person being caused by the illegal acts of other law enforcement officers. An officer can be prosecuted criminally for standing by and failing to intervene to prevent harm to a prisoner caused by other officers. United States v. McKenzie; United States v. Koon. See Anderson v. Branen.

4. Supreme Court Restraint

Since the spate of decisions of the late 1980s, Supreme Court decisions have exhibited restraint in extending Bivens into new areas, noting that the absence of statutory relief for a constitutional violation does not necessarily imply that courts should award money damages against officers responsible for the violation (e.g., the Court refused to allow military persons to sue for damages caused by the unconstitutional conduct of their officers; also, the Court refused to allow suits for First Amendment violations where there were comprehensive procedural and substantive provisions giving remedies although those did not provide complete relief).

Schweiker v. Chilicky (1988) said that the absence of statutory relief does not mandate that the court award money damages against federal officials responsible for constitutional violations. The Court must give appropriate deference to indications that congressional inaction has not been inadvertent, and should not create Bivens remedies when the design of federal government programs suggests that Congress has provided what Congress considers to be adequate remedies for constitutional violations that may occur during a program's administration.

A money damages remedy against federal officials for constitutional torts will not be devised by the courts where "special factors counsel hesitation in the absence of affirmative action by Congress."

Special factors include the existence of statutory mechanisms giving meaningful remedies against the United States, even though those remedies do not provide "complete relief" to the claimant.

5. Indemnification

Government employees who lose Bivens suits and have to pay judgments as a result may *request* indemnification from the United States, but the government is under no obligation to indemnify the employee. Note that,

unlike a suit against the United States under the FTCA, in a Bivens suit a court may award punitive damages also.

C. Civil Suits Against Organizations: Inadequate Training

The Supreme Court has held also that if a government entity acts indifferent to training, then the plaintiff can sue the entity. However, the standard of proof is deliberate indifference. This is a higher standard than gross negligence. See City of Canton, Ohio v. Harris.

IX. CONSTITUTIONAL TORT IMMUNITY OF FEDERAL EMPLOYEES

A. Absolute Versus Qualified Immunity

The law has recognized two different types of immunity from civil liability: absolute and qualified or limited "good-faith." The problem has been in resolving the extent to which the court will protect the actions of government employees. See Cleavinger v. Saxner; Wood v. Strickland; Butz v. Economou.

B. Requirements for Qualified Immunity

Qualified immunity (sometimes called "good faith" immunity) is an affirmative defense that the defendant must plead. Qualified immunity shields government officials from liability for civil damages provided:

* They are performing discretionary functions (as opposed to ministerial functions); and

* Their conduct does not violate clearly established statutory or constitutional rights of which a reasonable person would have known. This means that the defendant could not reasonably have been expected to know that the conduct violated a statutory or constitutional right. If the law at the relevant time

was not clearly established, an official is not expected to anticipate subsequent legal developments.

1. Discretionary Function

The term is broader than and unrelated to the same term used in the FTCA. It is the official's ability to exercise judgment that is the object of the immunity's protection. A law that fails to specify the precise action that the official must take in each instance creates only discretionary authority. (Davis v. Sherer).

IPO 5 - Recognize the elements of qualified immunity.

From now on, government officials performing discretionary functions generally are shielded from liability for civil damages as far as their conduct does not violate clearly established statutory or constitutional rights of which a reasonable person would have known.

If the Supreme Court clearly established the law, the immunity defense ordinarily should fail, since a reasonably competent public official should know the law governing his conduct. Nevertheless, if the official pleading the defense claims extraordinary circumstances and can prove that he neither knew nor should have known of the relevant legal standard, the defense should be sustained. Harlow v. Fitzgerald.

2. Clearly Established

If the employee is performing a discretionary function at the time his conduct violates a constitutional right, it must also be a clearly established federal constitutional right before liability can attach. Elder v. Holloway.

In assessing whether the right that was allegedly violated is “clearly established,” the test is whether, in the light of pre-existing law, the unlawfulness of the act is apparent. See Mitchell v. Forsyth. The right must

be apparent to a reasonable official acting in the same circumstances faced by the defendant for the right to be "clearly established." Sellers v. Baer.

C. Clearly Established Constitutional Right

A prerequisite to a Bivens recovery is proof that the defendant violated a "clearly established constitutional right." See Anderson v. Creighton; Hunter v. Bryant. In Seigert v. Gilley, the Court denied a Bivens claim that alleged that a former supervisor had written a defamatory letter concerning the plaintiff's prior job performance to another agency seeking the supervisor's recommendation. The Court found that the plaintiff had failed to allege the violation of a clearly established constitutional right, since under earlier decisions the Court had ruled that damage to reputation was not a protected "liberty" interest.

The following are examples of legal principles that the courts have held to be clearly established:

- Ë conditions under which deadly force may be used.
- Ë the constitutional test applied to the use of deadly force in making an arrest.
- Ë when an officer can enter a third party residence to make an arrest.
- Ë probable cause and the standards applied to search and seizure.
- Ë use of roadblocks as constituting deadly force.
- Ë strip searches incident to arrest.
- Ë a person cannot be arrested simply for failure to answer questions of a law enforcement officer.

- Ë omission of material information from an arrest affidavit violates the Fourth Amendment.

D. Objectively Reasonable Conduct

In assessing whether qualified immunity protects a law enforcement officer, the test to be applied is one of objective reasonableness.

* Thus, an officer who applies for a warrant under circumstances in which a reasonably well-trained officer would have known that his affidavit failed to establish probable cause and that he should not have applied for a warrant is not immune (Malley v. Briggs).

* This is true even if the magistrate erroneously issues the warrant, if no officer of reasonable competence would have requested the warrant.

X. FEDERAL LAW ENFORCEMENT OFFICERS' GOOD SAMARITAN ACT OF 1998

A. Purpose of the Act

The express purpose of the act is to protect federal law enforcement officers who intervene in certain situations to protect life or prevent bodily injury. There is no federal law that generally authorizes a federal law enforcement officer to enforce state law. Indeed, before the passage of the Good Samaritan Act, there was no federal statute that expressly authorized a federal law enforcement officer who spontaneously encountered a non-federal, violent crime in progress. Nor was there a statute that protected officers as they responded to emergencies. Consequently, courts have ruled that these officers were acting as private citizens rather than in their scope of employment. Officers in such situations whom plaintiffs sued would not be entitled to rely on the legal defense of qualified immunity nor would they be entitled to request government representation or indemnification.

The Good Samaritan Act provides federal law enforcement officers protection against common law liability (i.e., assault, battery, negligence, false arrest, etc.) and Constitutional tort liability (Bivens actions) if-

1. the officer was protecting an individual from a crime of violence, or

2. the officer was providing immediate assistance to an individual who suffered or was threatened with bodily harm, or

3. the officer was preventing the escape of an individual who committed a crime of violence in the presence of the officer.

B. Presumption That Certain Private Actions Now Within Scope of Employment

Significantly, the Good Samaritan Act provides, that for the purposes of the FTCA, the law deems that a federal officer acts within the scope of his or her employment, if the officer meets one of these three standards. The legislation provides protection, by eliminating personal liability, to federal officers plaintiffs sue for negligence or other torts arising out of their intervention in a non-federal context.

The Good Samaritan Act affords federal officers intervening in emergencies a presumption that he or she is acting within the scope of their employment for the purposes of establishing a qualified immunity defense. Before the passage of the act, if an officer intervened in a violent confrontation and a party alleged that the officer violated their constitutional rights, the officer was unable to raise the defense of qualified immunity.

Extending the officer's scope of employment to include non-federal crimes of violence committed in their presence gives the officer the opportunity to request a legal defense paid for by the Department of Justice. Although the

government's obligation to defend the officer is discretionary, such a request before the Act was impossible to meet.

Not every federal law enforcement officer is covered by the Good Samaritan Act. Congress has extended the Act only to "Law Enforcement Officer" as defined at 5 U.S.C. § 8401. Suffice it to say that Special Agents who are classified in the 1811 series who enjoy "6(c)" retirement coverage are covered by the Act. Many other law enforcement positions not qualified as "1811" (i.e., Probation and Pre-Trial Services Officers, 1801 General Investigators) may also be covered.

XI. LEGAL USE OF DEADLY FORCE

A. Guidelines for the Use of Deadly Force

1. Department of Treasury Guidelines (dated 10/17/95)

a. Use of Force Policy

(1) The primary consideration in the use of force is the timely and effective application of the appropriate level of force required to establish and maintain lawful control. A paramount consideration is the preservation of life and prevention of bodily injury.

(2) The respective Treasury Law Enforcement Bureau heads shall set forth guidelines for weaponless control techniques, intermediate weapons and firearms or lethal weapons with non-lethal munitions, in accordance with that bureau's law enforcement mission.

(3) Definition: Weaponless control techniques include officer presence, identification, verbal commands and physical control techniques, such as comealongs, touch pressure points, and empty hand strikes.

(4) Definition: Intermediate weapons are weapons other than firearms or lethal weapons with non-lethal munitions approved by each Treasury Law Enforcement Bureau.

b. Use of Deadly Force

(1) Definition: Deadly Force.

Deadly force is the use of any force that is likely to cause death or serious physical injury. Deadly force does not include force that is not likely to cause death or serious physical injury but unexpectedly results in such death or injury.

(2) Deadly Force. Treasury Law Enforcement Officers may use deadly force only when necessary, that is, when the officer has a reasonable belief that the subject of such force poses imminent danger of death or serious physical injury to the officer or another person.

(3) Fleeing Felons: Deadly force may be used to prevent the escape of a fleeing

subject if there is probable cause to believe:

(a) the subject has committed a felony involving the infliction or threatened infliction of serious physical injury or death; and

(b) the escape of the subject would pose an imminent danger of death or serious physical injury to the officer or to another person.

c. Use of Non-Deadly Force. If force other than deadly force reasonably seems sufficient to accomplish an arrest or otherwise accomplish the law enforcement purpose, deadly force is not necessary.

d. Verbal Warnings. If feasible and if to do so would not increase the danger to the officer or others, a verbal warning to submit to the authority of the officer shall be given before the use of deadly force.

e. Warning Shots. Warning shots are not permitted, except as follows:

(1) Warning shots may be used by Treasury Law Enforcement Officers in exercising the United States Secret Service's protective responsibilities, consistent with policy guidelines promulgated by the Director, United States Secret Service.

(2) Warning shots may be used by the United States Customs Service on the open waters, consistent with policy guidelines promulgated by the Commissioner of Customs.

f. Vehicles

(1) Officers may not fire weapons solely to disable moving vehicles, except as follows: Treasury Law Enforcement Officers, in exercising the United States Secret Service's protective responsibilities, may fire weapons solely to disable moving vehicles, consistent with policy guidelines promulgated by the Director, United States Secret Service.

(2) Officers may fire weapons at the driver or other occupant of a moving motor vehicle only when:

(a) the officer has a reasonable belief that the subject poses an imminent danger of death or serious physical injury to the officer or to another person; and

(b) the public safety benefits of using such force outweigh the risks to the safety of the officer or other persons.

g. Vicious Animals. Deadly force may be directed against dogs or other vicious animals when necessary in self-defense of others.

2. Department of Justice Guidelines (released 10/17/95)

The Department has published guidelines related to three different situations, two of which are not applicable to most officers: (1) persons held in detention by INS, (2) situations involving persons in the custody of the Bureau of Prisons.

a. Permissible Uses. Law enforcement officers ... of the Department of Justice may use deadly force only when necessary, that is, when the officer has a reasonable belief that the subject of such force poses an imminent danger of death or serious physical to the officer or to another person.

Fleeing felons. Deadly force may be used to prevent the escape of a fleeing subject if there is probable cause to believe: (1) the subject has committed a felony involving the infliction or threatened infliction of serious physical injury or death, and (2) the escape of the subject would pose an imminent danger of death or serious physical injury to the officer or to another person.

b. Non-Deadly Force. If other force than deadly force reasonably appears to be sufficient to accomplish an arrest or otherwise accomplish the law enforcement purpose, deadly force is not necessary.

c. Verbal Warning. If feasible and if to do so would not increase the danger to the officer or others, a verbal warning to submit to the authority of the

officer shall be given before the use of deadly force.

d. Warning Shots. Warning shots are not permitted outside the prison context.

e. Vehicles

(1) Officers may not fire weapons solely to disable moving vehicles.

(2) Officers may fire weapons at the driver or other occupant of a moving motor vehicle only when:

(a) the officer has a reasonable belief that the subject poses an imminent danger of death or serious physical injury to the officer or to another person; and

(b) the public safety benefits of using such force outweighs the risks to the safety of the officer or other persons.

f. Vicious Animals. Deadly force may be directed against dogs or other vicious animals when necessary in self-defense of others.

g. Commentary

The guidelines contain commentary that includes certain definitions rather than having them within the body of the guidelines.

(1) Deadly force is defined as it is in the Treasury guidelines.

(2) Probable cause, reason to believe or a reasonable belief, for purposes of this policy, means facts and circumstances, including the reasonable inferences drawn therefrom, known to the officer at the time of the use of deadly force, that would cause a reasonable officer to conclude that the point at issue is probably true. The reasonableness of a belief or decision must be viewed from the perspective of the officer on the scene, who may often be forced to make split-second decisions in circumstances that are tense, unpredictable, and rapidly evolving. reasonableness is not to be viewed from the calm advantage point of hindsight.

(3) Intermediate force. If force lesser than deadly force could reasonably be expected to accomplish the same end, such as the arrest of a dangerous fleeing subject, without unreasonably increasing the danger to the officer or to others, then it must be used. Deadly force is not permissible in such circumstances, although the reasonableness of the officer's understanding at the time deadly force was used shall be the benchmark for assessing applications of this policy.

B. Imminent Danger

Notice that the term "imminent danger" while used, is not defined. At FLETC, all students are taught that there are three requirements for imminent danger:

1. Present Opportunity --- current conditions exist which would allow the subject to inflict death or serious bodily injury.

2. Physical Capability --- the subject has the apparent capability; i.e., the subject has access to a deadly weapon.

3. Manifested Intent --- by word or deed the subject has expressed a desire to injure.

XII. PRIVATE LIABILITY INSURANCE

A. Why it Should Be Considered

The Federal Law Enforcement Officers' Good Samaritan Act of 1998 does not mandate that the government indemnify the officer for any damages suffered by the officer if a Bivens civil suit is ultimately successful. Although by virtue of the Good Samaritan Act, an officer who intervenes in an emergency has the benefit of the qualified immunity defense. The officer may also request a legal defense paid for by the Department of Justice. However, this does not mean that the government will pay the judgement (indemnify) if rendered against the officer. It is therefore suggested that the officer consider obtaining private liability insurance that will indemnify the officer in these circumstances

B. Government Reimbursement For up to Half of Premium

The annual cost of most professional liability insurance policies for federal employees and law enforcement officers is less than $300. Recently, federal

agencies were given authority to reimburse employees for up to half the annual premium cost. Many professional liability insurance programs are available through both private carriers and government employee benefit associations.

C. Scope of Private Liability Insurance Policies

Most of the policies written by private carriers and government employee benefit associations for federal employees include coverage (up to the policy limit) for both representation (if D.O.J. chooses not to defend the officer) and any award of damages against a defendant for a constitutional tort. Since this is potentially the most costly type of action a government employee could face, it is important the constitutional tort coverage be included in the policy chosen.

Generally, most policies will exclude certain actions from coverage including, but not limited to, wilful violations or the penal code (criminal statutes). Fraudulent actions with affirmative dishonesty or actual intent are also typically not covered by these insurance programs.

TABLE OF CASES

For a more in depth understanding of many of the legal principles presented in this text, particularly those dealing with liability for constitutional torts, the student may wish to refer to the following court decisions and statutes.

Elder v. Holloway, 510 U.S. 510, 114 S.Ct. 1019 (1994)

Feres v. United States, 340 U.S. 135, 71 S.Ct. 153 (1950)

Harlow v. Fitzgerald, 457 U.S. 800, 102 S.Ct. 2727 (1982)

Hunter v. Bryant, 502 U.S. 224, 112 S.Ct. 534 (1991)

Johnson v. Sawyer, 47 F.3d 716 (5th Cir. 1993)

Kreines v. United States, 959 F.2d 834 (9th Cir. 1992)

Malley v. Briggs, 475 U.S. 335, 106 S. Ct. 1092 (1986)

McNeil v. United States, 508 U.S. 106, 113 S.Ct. 1980 (1993)

Mitchell v. Forsyth, 472 U.S. 511, 105 S.Ct. 2806 (1985)

Schweiker v. Chilicky, 487 U.S. 412, 108 S.Ct. 2460 (1988)

Seigert v. Gilley, 500 U.S. 226, 111 S.Ct. 1789 (1991)

Sellers v. Baer, 28 F.3d 895 (8th Cir. 1994)

United States v. Gaubert, 499 U.S. 315, 111 S.Ct. 1267 (1991)

United States v. Koon, 6 F.3d 561 (9th Cir. 1993), 34 F.3d 1416 (9th Cir. 1994), 45 F.3d 1303 (9th Cir. 1995)

United States v. McKenzie, 768 F.2d 602 (5th Cir. 1985)

Weissich v. United States, 4 F.3d 810 (9th Cir. 1993)

Westfall v. Erwin, 484 U.S. 292, 108 S.Ct. 580 (1988)

Wilson v. City of Chicago, 707 F.Supp. 379 (N.D. Il. 1989)

Wood v. Strickland, 420 U.S. 308, 95 S.Ct. 992 (1975)

FOURTH AMENDMENT

DESCRIPTION:

This 10-hour block of instruction examines the principles of search and seizure as governed by the Fourth Amendment, such as the requirements for the search of persons and property, probable cause, warrant and warrantless searches, and the seizure of persons and property.

TERMINAL COURSE OBJECTIVE:

Students will identify the requirements for obtaining and executing warrants, and for the search and seizure of persons and property with and without warrants.

INTERIM PERFORMANCE OBJECTIVES:

1. Identify the existence of a reasonable expectation of privacy.

2. Identify the existence of probable cause.

3. Identify actions that reasonable suspicion and probable cause justify.

4. Recognize when a warrant is required to conduct an arrest, search or seizure.

5. Identify the scope of the lawful execution of a warrant.

6. Recognize situations in which an arrest, search or seizure is lawful without a warrant.

7. Identify the principles of the plain view doctrine.

8. Identify the requirements of a valid consent search.

9. Identify the principles of a lawful inventory search.

10 Identify the principles of a lawful inspection search.

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THE FOURTH AMENDMENT

TABLE OF CONTENTS

FOREWORD

This course is taught by the case method. The cases are guides to help you in making legal decisions. It is unlikely that any situation you will face will be exactly like any case discussed. However, familiarity with the leading cases on the point will enable you to make an intelligent decision that should lead to the admission of the items of evidence seized.

After your return to the field, you should attempt to keep up-to-date in developments in this legal area. Two good sources are newsletters published by many agencies' chief counsel and the *Quarterly Review* found at the FLETC Legal Division web page found at-(www.ustreas.gov/fletc/legal/legal_home.htm). The *Quarterly Review* is updated in February, June, August, and November by members of the FLETC Legal Division.

Visit the Legal Division Web Page at:

www.ustreas.gov/fletc/legal/legal_home.htm

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FOURTH AMENDMENT

I. INTRODUCTION

The subject of Search and Seizure is an important legal area for a law enforcement officer for several reasons. First, searching a suspect's body, house, office or vehicle typically yields important evidence in criminal investigations. Second, conducting searches and seizures can be one of the most dangerous activities an officer will do. Third, many lawsuits against officers stem from their actions in conducting a search. Courts may hold officers personally liable to persons whose constitutional rights they have violated by unreasonably searching and seizing them and their property. Also, courts can require an officer's agency under the Federal Tort Claims Act to pay damages to a person subjected to unreasonable search or seizure. Therefore, an officer must learn the principles of search and seizure, not only to obtain evidence of criminal activity, but to avoid civil liability for failing to comply with the United States Constitution.

The Constitution may properly be viewed as a contract between the American people and the Federal government. This contract places a variety of restrictions on the actions the Federal government may take. Perhaps none is more important to the Federal law enforcement officer than the Fourth Amendment.

II. THE FOURTH AMENDMENT: THE PREFERENCE FOR WARRANTS

The Fourth Amendment:

> *The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.*

The Fourth Amendment can be divided into two clauses for the purposes of analysis. The first clause, although negatively stated ("The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated"), requires that all searches must be "reasonable." The second clause states that all warrants must be based upon probable cause (". . . and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.").

The Fourth Amendment does not require all searches to be accompanied by a warrant or even probable cause. Some types of searches, such as consent searches or those performed incident to a lawful arrest, require neither a warrant nor probable cause. However, the Fourth Amendment does demand that every search and seizure be reasonable. Also, the Fourth Amendment demands that if a magistrate issues a warrant, it *must* be based on probable cause, supported by oath or affirmation, and describing the place, person and item to be searched for with particularity.

The underlying principle of the law is that if officers have sufficient time *and* if they have probable cause, reasonableness dictates they should obtain a warrant. The courts frequently and strongly stress their preference for warrants. Of course, urgent circumstances may dictate that some warrantless search be conducted. Warrantless searches, to be reasonable, must fall within one of the few specially established and well-defined exceptions to the warrant requirement. When a law enforcement officer conducts a warrantless search, the government has the burden of proving an acceptable excuse for failing to secure a warrant. In doubtful situations the officer *should try to obtain a warrant.*

III. REASONABLE EXPECTATION OF PRIVACY

The Fourth Amendment provides that the people shall be " . . . secure in their *persons, houses, papers* and *effects* against unreasonable searches and seizures . . . " Identifying the areas that the Fourth Amendment protects and the extent this protection exists has presented several problems for the investigating officer and the courts.

IPO 1 - Identify the existence of a reasonable expectation of privacy

In Katz v. United States, the Supreme Court provided the standard for determining the extent of Fourth Amendment protection. The Court stated that the Constitution protects *people*, not places. Therefore, the protection provided by the Constitution to an individual in their person, or an area, or possessions, depends on the reasonable expectation of privacy afforded the individual. Anytime the government intrudes on a person's reasonable expectation of privacy, it is engaged in a Fourth Amendment search.

What one seeks to preserve as private, even in a public area, may be protected. For example, a person who uses a public telephone booth and closes the door, manifests an expectation of privacy in the conversation. A law enforcement officer using a concealed microphone on that public telephone booth is engaged in a search. On the other hand, what one knowingly exposes to the public, even in the privacy of their own home or office, is not protected. For example, a person who commits a criminal violation and boasts loudly of their deeds in their home with the windows open cannot complain of law enforcement officers overhearing their words from the street outside.

The Court articulated a two-prong test in Katz to determine if a reasonable expectation of privacy exists:

> (1) Does the individual in question indicate by word or deed that they expect privacy in the instant circumstance?
>
> and, if so
>
> (2) Is the privacy demanded one that the "community" is prepared to grant as reasonable?

Katz manifested an expectation of privacy by entering a telephone booth and closing the door. This was a reasonable expectation of privacy and one that

the "community" was prepared to grant. Katz successfully met both elements of the test.

> Katz Test
> 1) Does the subject expect privacy?
> and
> 2) Is the privacy one the community is willing to extend?

The expectation of privacy does not depend on the concepts of property law but is measured by the objective *reasonableness* of the individual's expectation of privacy. A court must evaluate all the facts and circumstances of the particular case. Considering the expectation of privacy standard, we will now examine the scope of the protection of the Fourth Amendment.

A. Persons

The Constitution protects "persons" rather than places. No differentiation is made between citizens of the United States and non-citizens present here, nor between innocent and guilty persons. Therefore, the Constitution protects all persons, even those who may be in this country illegally, against violations of the Fourth Amendment when their conduct occurs within the United States. Even a foreign spy illegally in this country for the avowed purpose of overthrowing our government is afforded the protection of the Constitution.

Persons in the military service of the United States also have the protection of the Fourth Amendment. Under some circumstances, their reasonable expectation of privacy is lessened due to the specialized mission and needs of the armed forces in fighting wars and maintaining the national defense.

Courts have held that corporations are "person[s]" for the purpose of the Fourth Amendment. A corporation, as a legal entity, may own property, sue and be sued, and be prosecuted for criminal violations. Therefore, the law protects a corporation from unreasonable searches and seizures to the same extent as any living person, except for the principle of curtilage.

B. Personal Non-testimonial Evidence

Some forms of evidence have been classified as “non-testimonial” and, therefore, not subject to the protection of the Fifth Amendment's self incrimination clause. Evidence in the form of fingerprints, handwriting exemplars, blood samples, etc., may be taken from persons without causing those persons to be witnesses against themselves. However, since individuals manifest an expectation of privacy in their bodies, the Fourth Amendment protects these areas. If a court finds that an unreasonable search or seizure took place in obtaining items, it will suppress the evidence. For example, fingerprints constitute non-testimonial evidence. Directing a person to reveal their fingerprints does not compel that individual to be witnesses against themselves. However, if those suspects are illegally arrested for the purpose of obtaining their fingerprints, the seizure of the fingerprints violates the individual's expectation of privacy and those fingerprints will be suppressed as evidence.

C. Papers and Effects (Personal Property)

The protection of the Fourth Amendment extends to all personal property in which someone has a reasonable expectation of privacy. The specific mention of “papers” in the Constitution is a recognition of the great expectation of privacy that individuals have in their personal papers. Although the government may not compel individuals to produce their personal papers to be used against them because of the Fifth Amendment, there is no special sanctity in papers as distinguished from other kinds of property for the purposes of search and seizure. Therefore, officers may obtain a search warrant for and seize personal papers, diaries, bank and financial records, etc., and use these items as evidence in court.

The expectation of privacy in first class mail is such that it may not be opened but under the authority of a search warrant. Lower classes of mail have a reduced expectation of privacy and postal officials may open such mail pursuant to their regulations. Since the expectation of privacy in mail only extends to the contents of the letter or parcel, the weight, description, external markings and writings are exposed to the public and may be recorded

by officers without obtaining a search warrant, subject to postal regulations. The courts have also permitted a reasonable delay in the transmission of an item of mail to obtain a search warrant based on probable cause.

In United States v. Chadwick, the Supreme Court recognized a privacy interest in personal containers, such as luggage, briefcases, purses, etc., since these are areas where persons normally keep their papers and effects. The Court held that many containers already reveal their contents by having the contents listed on the outside or being constructed of clear material. These containers do not constitute an area of privacy.

All property and evidence are protected from unreasonable searches and seizures. This is so despite the nature of the item seized. Even contraband and other property illegally possessed by an individual, such as stolen property, is protected under the Fourth Amendment and will be suppressed if illegally seized. Note that contraband and other illegally possessed items taken from a defendant will not be returned to that individual.

D. Houses (Premises)

The term "houses" in the Constitution have been interpreted very broadly by the courts. Legal interpretation has extended the protection of the Fourth Amendment to cover practically all buildings and structures, whether used as homes, offices, or storage facilities. The concepts of traditional property law are not controlling. The individual's reasonable expectation of privacy establishes the measure of the Fourth Amendment's protection.

A dwelling house, be it a home, an apartment, etc., is protected by the law more than any other structure. This is due to the traditional expectation of privacy manifested in the home. The fact that a dwelling or structure is unoccupied temporarily does not change its status. For example, a vacation cottage that an occupant resides in for only a few weeks each year has the protection of the Fourth Amendment from unreasonable searches all year long.

Multiple-unit dwellings, such as apartments, hotel rooms, etc., are also protected from unreasonable searches during the period that the resident has the right to occupancy the premises. Courts treat each dwelling unit in a multiple-unit structure as a separate, independent premises entitled to Fourth Amendment protection. If agents want to search an entire apartment building containing four units, they must establish independent probable cause to justify the search of each unit to comply with the requirements of the Fourth Amendment.

A lessened expectation of privacy may accompany the occupancy of some types of dwelling units. For example, the occupancy of college dormitories may be subject to regulations authorizing college officials to enter rooms to inspect mechanical equipment such as plumbing or heating or to provide maid service. The residents, however, retain an expectation of privacy in their personal belongings and their rooms, subject to the limited specific purposes for which others may have authority to enter. College officials could not abuse their limited inspection authority to enter a student's room, nor authorize law enforcement officers to enter the room, to conduct a search for criminal evidence. Keep in mind that if officials of a private college intrude into a dorm room, the evidence would be admissible since this is a private search, to which the Fourth Amendment has no applicability.

Some dwelling houses may be used to conduct illegal activities such as gambling or prostitution. Although the activities offend the law, the individual's right to expect privacy is protected. The illegal activities involved do not place the premises beyond the protection of the Fourth Amendment.

All structures are protected from unreasonable searches based on the expectation of privacy manifested by the individual. Storage buildings, barns, lockers, stores, and offices share the protection against unreasonable governmental intrusion. The amount of expected privacy that is reasonable concerning offices and other business premises depend on the character of the premises itself and the degree of public access. Wherever an occupant has granted the public access, law enforcement officers are allowed access. However, permission to enter a public office or premises does not create a

right to search. Officers may make observations of and seize contraband or other evidentiary items in "plain view" but have no authority to search desks, filing cabinets, closets or other closed or limited-access spaces. Areas that an individual seeks to preserve as private, although in an area accessible to the public, are protected from unreasonable search and seizure.

Persons may not typically establish a reasonable expectation of privacy in a jail or prison. The need for security and discipline outweigh the privacy protection normally afforded a person by the Fourth Amendment. In prison, surveillance and monitoring are routine. A reasonable expectation of privacy is established in those rooms specifically provided for prisoners to confer with their attorneys.

E. Curtilage and Open Fields

Curtilage is a common law property concept that defines the area of the home and separates it from the surrounding "open fields." The law defines curtilage as the area that protects the intimate activity associated with the sanctity of a man's house and the privacies of life. The courts have extended the protection of the Fourth Amendment to include the dwelling house and the curtilage area around the house. Therefore, just as law enforcement officers may not enter the house to search without a warrant or other legal justification, neither may they enter the curtilage.

A major difficulty in determining whether a specific area is curtilage is that curtilage is a fluid concept. The courts have not given a fixed definition of what forms curtilage for every case. In a typical suburban neighborhood the curtilage of a home probably extends to the entire front, side and back yards. In an urban area, the curtilage may be only a small private courtyard at the rear of the house. In a rural area, the curtilage of the farmhouse may extend to adjacent outbuildings such as barns and storage sheds and may include private garden areas near the house. Each case is different depending on its own special facts and circumstances.

To determine if an area is within the curtilage, the courts have considered:

1. the nearness or connection to the dwelling
2. its inclusion within a general enclosure surrounding the dwelling
3. whether the area is used in association with the intimate activities of the home
4. the steps taken by the homeowner to protect the area from view by passers by; United States v. Dunn

Note that in order for a structure to have the added protection of the curtilage, the structure must be within the curtilage. This does not mean that an individual loses any expectation of privacy in the interior or contents of other structures outside the curtilage. However, the expectation of privacy does not extend to any area beyond the walls of the structure itself. For example, if an agent enters the backyard of a private home in order to look into the window of a small workshop attached to the home, this observation is properly called a search. The officer has violated the curtilage. On the other hand, if the defendants maintained an unfenced workshop on property not connected with their residence, the officer might lawfully, without a warrant, approach the workshop and look through the window. The officer could still not break into or otherwise enter the workshop without complying with the Fourth Amendment.

The importance of curtilage as a property concept has been lessened because of the Katz case. The courts still occasionally use the terms curtilage and open fields, but they use them to define the areas of expectation of privacy around the dwelling house. The traditional curtilage area is now considered the area where an individual has a reasonable expectation of privacy. On the other hand, the open fields are areas where the landowner does not have an expectation of privacy.

Officers may enter upon the open fields to make searches or observations of evidence in "open view" without a warrant or any other legal justification if they are on official business. If the officer obtains evidence from the open fields areas, its use does not violate the Fourth Amendment. The law

enforcement officers may be trespassers on private property, but this fact will not prevent the lawful use of evidence obtained in the performance of their law enforcement duties. If the officers are physically located off the curtilage, they may make observations on the curtilage. However, if there is any doubt whether a vantage point or a place to be searched is within the curtilage, the officer should obtain a warrant.

F. Surveillance v. Privacy

One function of the law enforcement officer is to make observations and obtain evidence. The use of surveillance by officers is an accepted and effective tool for obtaining evidence. However, there are limitations. Generally, the use of an electronic listening device is an invasion of privacy. Yet, if officers can position themselves lawfully in an area where they may eavesdrop on a conversation with the naked ear, no reasonable expectation of privacy exists in those conversations. For example, the courts have held that defendants have no *reasonable* expectation of privacy in their motel room conversations that a law enforcement officer overhears by listening through the door to the adjoining motel room.

An area of concern that can cause problems for law enforcement officers conducting surveillance is the use of electronic tracking devices, or beepers, to surreptitiously monitor the movements of automobiles, aircraft, vessels or other moveable items. The legality of beepers should be approached by a two-step analysis: (1) does the Fourth Amendment apply to the *installation* of the beeper?, and (2) does the Fourth Amendment apply to the *monitoring* of the beeper?

As to the first step, government agents need a court order, or a well-established exception to the warrant requirement, to *install* a beeper if installation of the beeper requires entry into an area protected by a reasonable expectation of privacy. As to the second step, *monitoring* the beeper, the Supreme Court in United States v. Knotts, held that the monitoring of a beeper on public highways, waterways or airways for surveillance purposes is not a violation of one's reasonable expectation of

privacy. However, in United States v. Karo, the Court required a warrant to monitor a beeper inside a residence.

Regarding other uses of tracking devices, the courts have generally held that a person has no reasonable expectation of privacy to believe that the government will not place a beeper in items exchanged for contraband; e.g., a television set exchanged by undercover agents for narcotics. Due to the divergence of opinions by the various courts, officers should contact either the United States Attorney's office or their agency's legal advisor before using any tracking device to find out the position of the courts in their area on the legality of the use of these devices.

G. Abandonment

If persons voluntarily abandon their ownership, right to usage, possession or interest in their real or personal property, they no longer retain a reasonable expectation of privacy in that property. Abandoned property has no Fourth Amendment protection because: (1) the defendant has given up a reasonable expectation of privacy in that property; (2) the defendant no longer has standing to object to use of the evidence in court; or (3) both.

The search of the property is justified solely on the fact that the property, or the individual's privacy interest in that property, is abandoned. If the court finds that the possessor abandoned the property before a search or seizure, then the actions of the officer will be legal whether or not the officer knew of the abandonment at the moment of seizure.

Courts define abandonment as the voluntary relinquishing of possession of property with no present intention of reclaiming it. The resolution of the question of whether or not abandonment of property has resulted is determined from all of the facts and circumstances surrounding the alleged abandonment, e.g., location, statements, conditions, actions.

The location of allegedly abandoned property is critically important. If an individual discards personal property in an area where one normally has a lesser expectation of privacy, i.e., a public place, then a court may deem that

property abandoned without proving that the abandonment was permanent. Generally, the act of discarding the property alone is sufficient to determine abandonment. For example, if individuals walking through a public park notice that a police officer is following them, they may decide to discard narcotics in a paper bag behind a park bench. The officer may then seize the bag and look inside. The narcotics could be used against the defendants because they abandoned them, even though the individuals may claim that their true intent was to hide the bag and return for it after the police officer had left.

On the other hand, if a defendant discards property in a traditionally private area, e.g., an individual's home, or on the curtilage, it is not considered abandoned. Courts will require other actions or conduct to show not only the act of discarding or abandoning, but the actual intent to relinquish the expectation of privacy. One example is where individuals discard items in their trash can in their dwelling or on their curtilage. The item normally would not be considered abandoned until it is removed from the curtilage for garbage pickup or until the garbage collectors have taken possession of the property. In this way, individuals may abandon their house, automobile or any other property if the court finds that there was an apparent *intent* to abandon plus the *act* itself.

The government may not take advantage of an abandonment of property caused or induced by the *unlawful* acts of the law enforcement officers. For example, if officers illegally stop an automobile and notice an occupant throw a paper bag out onto the side of the road, a subsequent seizure and search would be illegal. The bag would not be deemed abandoned because the illegal acts of the officers caused the abandonment, making it involuntary. In this situation the owner still has standing to object to the violation of their constitutional rights and the seizure of their property.

IV. PROBABLE CAUSE

A. Probable Cause and its Importance

IPO 2 - Identify the existence of probable cause

The Constitution requires that no warrants shall issue except those based on probable cause. Probable cause is a set of facts or apparent facts that are sufficiently strong in themselves to lead a reasonable, prudent law enforcement officer to believe that a crime has been, is about to be, or is being committed and that evidence of that crime is found at the place to be searched.

The test of probable cause is a nontechnical standard and is applied with common sense. There is no set formula for probable cause. Therefore, courts decide its existence on the facts and circumstances of each individual case.

The magistrate judge initially determines the existence of probable cause to whom the law enforcement officers present an affidavit. The officer must articulate facts so that the magistrate judge can make an independent determination of probable cause. Only those facts actually communicated to the magistrate judge under oath can be used to support a warrant. If the magistrate issues a warrant that is subsequently ruled to be invalid for a lack of probable cause, an agent may not save the warrant, or a search under its authority, by later bringing forward facts that the agent had known previously but failed to communicate to the magistrate judge.

B. Personal Knowledge - Reasonable Officer Standard

The ideal situation for the establishment of probable cause is one in which the agent presents facts within his or her personal knowledge gained from the investigation and observations. The magistrate judge and the courts will evaluate the facts in light of how they appear, not just to the reasonable person, but to the reasonable law enforcement officer. The agent may

include his or her specialized knowledge and experience. For instance, the magistrate judge may find probable cause to exist from recited facts that might not seem suspicious to a chemical engineer but would amount to probable cause when considered by a reasonable, experienced law enforcement officer.

The officer must be careful to recite only facts in the affidavit. Mere suspicion, hunches, or conclusions by the officer are not sufficient for the magistrate judge to determine the existence of probable cause. The magistrate judge must make the conclusions and reasonable inferences from the facts presented in the affidavit. Without the facts upon which the magistrate judge can make an independent determination of probable cause, no valid warrant can be issued.

C. Hearsay and the Aguilar Test

Often law enforcement officers have no personal knowledge of criminal activities and must rely on information passed to them from informants, victims, witnesses and co-conspirators. Rule 1101(d)(3) of the Federal Rules of Evidence and Rule 41(c) of the Federal Rules of Criminal Procedure provide that probable cause for the issuance of a search warrant may be based on hearsay information either wholly or in part.

When the officer uses hearsay information, the court must assure itself that sufficient facts are present to establish the trustworthiness of this information. In the 1964 case Aguilar v. Texas, the Supreme Court set forth what has become known as the two-pronged "Aguilar Test" for determining the trustworthiness of hearsay information. It is based on the theory that the magistrate judge must have specific *facts* upon which to make an independent finding of probable cause and not the simple conclusions of an officer or informant. First, there should be presented sufficient facts that will show the magistrate judge that the informant, whose identity need not be revealed, is credible, or worthy of belief. This is called the Aguilar Test "veracity" prong. Second, the officer must inform the magistrate judge of the underlying facts and circumstances that led the source to believe that items subject to seizure are where the source claims they are. This is called the "Basis of

Knowledge" prong. The affidavit must satisfy both prongs of the test to support a valid search warrant that is based on the Aguilar test:

1) Veracity Prong (Credibility of Source)

and

2) Basis of Knowledge of the Source

The first part of the Aguilar test requires that the source who provided the information be credible. The veracity prong is met by providing facts in the affidavit that will convince a detached magistrate judge of the source's record for truth, his innate reliability, or other circumstances that provide assurances of truth-telling.

An officer cannot merely state that the informant is reliable, credible, or trustworthy. The magistrate judge must have *facts*, not conclusions, upon which an independent finding that the informant is reliable can be based. The affidavit should set forth the character, reputation or history of the informant to show he or she is a truthful person. Some classes of persons are deemed to be credible by the very nature of their status. Based on this status, it is unlikely that the informant would fabricate information. These persons include:

- **U** other law enforcement officers
- **U** innocent bystanders
- **U** victims
- **U** eyewitnesses to a crime
- **U** partners-in-crime

Paid government informants are not presumed to be credible, because they have a compelling interest to fabricate information. The principle manner in establishing the reliability of an informant is with a proven track record. The affidavit should establish: How long the officer has known the informant; number of times this informant has given previous information; number of

times the information has been correct; the types of criminal activities involved, etc.

An officer cannot always establish a track record for all informants and, of course, there has to be a first time for every informant. If the affiant has not established the reliability of the person, the affiant should set forth the circumstances surrounding the information that will assure the magistrate judge of its trustworthiness on this occasion. When maintaining the confidentiality of an informant is desirable, the affiant should use as much detail as possible about the informant's record without disclosing the informant's identity. If the informant cannot be established as reliable without revealing his or her identity, then the affiant officer must establish for the Magistrate judge the reliability of the information by showing independent verification or corroboration of as much of the informant's information as possible.

The four basic practices a law enforcement officer may use to establish the credibility of a confidential informant (one whom the law enforcement officer has promised anonymity) are:

- **X** an established track record of the informant
- **X** corroboration of the information informant has provided
- **X** information was verified through independent sources
- **X** information provided meets a description of the suspect’s known reputation

Once the credibility of a source has been established, the magistrate judge must then be convinced that the information was provided based on a sufficient degree of personal knowledge. A source may not make a bare assertion or conclusion that evidence of a crime may be found in a certain location. The affidavit must set forth the facts upon which the informant has based that conclusion. Did the source see the contraband or other evidence? What did the source see, hear, smell, or touch?

If the information in the affidavit is deficient in stating specifically how the source obtained his information, a few courts have discussed an alternative. If the source's information is presented in such minute detail that the magistrate judge can conclude that the source could have obtained the information only first-hand, then this "self-verifying" detail may establish the basis of knowledge prong. The detailed information must be of such a nature, however, that the magistrate judge can be satisfied that the information was obtained first-hand and is not based on idle rumor or irresponsible conjecture. Reliance on "detail" to fully satisfy the basis of knowledge prong, due to the lack of firm judicial support in this area, is not recommended. The officer should attempt to satisfy this prong of Aguilar by showing the manner in which the source received the information. The details then provide added assurance of reliable information.

The importance of corroboration by law enforcement officers cannot be overemphasized. Defective information that does not meet the Aguilar test still can be considered in the overall test for probable cause if there is sufficient corroboration by officers. The more defective the hearsay information, the more independent corroboration is needed to establish probable cause. Therefore, the officer should include in the affidavit any information in the officer's possession that will help the magistrate judge find probable cause. For example, if the subject of the proposed search has a criminal record or a bad reputation, the affiant should pass this information onto the magistrate judge. Probable cause does not have to be based on evidence that would be admissible to prove guilt in a criminal trial because the rules of evidence do not apply to applications for warrants. Probable cause is the result of a consideration of the "totality of the circumstances." It can be created by several facts that may seem innocent when considered separately but become guilt-laden and suspicious when considered together. The only limitation placed on probable cause is that evidence, information, or observations obtained by law enforcement officers from a violation of an individual's constitutional rights may not be used to establish probable cause for a warrant against that person as they have standing to object to its inclusion.

D. Other Probable Cause Issues

Probable cause must exist at the time a magistrate judge issues the warrant and at the time of the search. A warrant cannot be based on stale information, or information that is no longer dependable because of its age. Beyond the requirements for probable cause, there must be sufficient facts presented in the affidavit so that the magistrate judge can conclude that the items to be searched for are presently found or will be found in the place to be searched. Rule 41(a)(1) also allows anticipatory warrants.

The issues regarding timeliness, have nothing to do with when the officer received the information. Fresh information suggests the items to be searched for have recently been or will be in the place to be searched at the time of the proposed search. How fresh the information must be depends on the circumstances of each case considering the nature of the evidence sought, the volume and turnover rate, plans of the violators as established by the probable cause, etc. As with the other areas of probable cause, corroboration and surveillance work by officers can aid in establishing timeliness and maintaining the life of the probable cause.

Probable cause to search must establish a link between the place to be searched with a probability that the items to be seized will be found there. For example, to search the home of a suspect in a narcotics investigation, probable cause that a suspect is dealing in heroin is not sufficient to justify a premises warrant. The probable cause shown to support a warrant to search the suspect's residence must establish that it is probable that the heroin to be seized is at that residence.

Specially trained dogs have long been accepted as valuable investigative tools in tracking fugitives, and the detection of explosives and narcotics. Most courts agree that the Fourth Amendment does not control the government’s use of such dogs, if the dog and its handler are lawfully present. The reasoning is that the dog merely smells the air around a container. Typically, an individual has no “reasonable expectation of privacy” in the air surrounding containers. Therefore, no Fourth Amendment “search” is involved.

The dog alert provides probable cause for a warrant, provided the officer lays the proper foundation in the affidavit for the warrant. To do so, the dog and its handler must be qualified as experts in detecting the presence of an odor from an explosive or controlled substance.

V. INVESTIGATIVE STOPS--THE TERRY DOCTRINE

A. Reasonable Suspicion

Before a law enforcement officer may make an investigative stop the officer must have that degree of proof or facts called "reasonable suspicion." Reasonable suspicion is a standard of proof below probable cause. To have reasonable suspicion, an officer must have:

1. Specific and articulable facts, which lead to . . .

2. A rational or reasonable inference that the conduct or activity observed is connected to the possible commission of a criminal act.

IPO 3 - Identify actions that are justified by reasonable suspicion and probable cause

Without reasonable suspicion the law enforcement officer may not stop an individual without violating that person's Fourth Amendment right to be free from "unreasonable" seizures. In fact, it was not until 1968 that the United States Supreme Court recognized reasonable suspicion, not probable cause, as the basis of knowledge permitting an officer to make an investigative stop. In a landmark decision, Terry v. Ohio, the Supreme Court emphasized that a "stop" by a law enforcement officer was a Fourth Amendment issue. The Court said:

> *It is quite plain that the Fourth Amendment governs "seizures" of the person which do not eventuate in a trip to the station house and prosecution for crime . . . "arrests" in*

> *the traditional terminology. It must be recognized that whenever a police officer accosts an individual and restrains his freedom to walk away, he has "seized" that person.*

Besides permitting the law enforcement officer to "stop" an individual, the Terry decision granted to the officer the right to do a protective frisk of the individual to detect if the suspect was armed. The Court stated:

> *We are now concerned with more than the governmental interest in investigating crime . . . (I)n addition, there is the more immediate interest of the police officer in taking steps to assure himself that the person with whom he is dealing is not armed with a weapon that could unexpectedly and fatally be used against him . . .*
>
> *When an officer is justified [i.e., the reasonable suspicion standard] in believing that the individual whose suspicious behavior he is investigating at close range is armed and presently dangerous to the officer or to others, it would appear to be clearly unreasonable to deny the officer the power to take necessary measures to determine whether the person is in fact carrying a weapon and to neutralize the threat of physical harm.*

Terry was an attempt by the Court to strike a balance between the individual's right to privacy and to be free of governmental interference against the legitimate need of law enforcement officers to conduct brief investigations without having to make an arrest. The law of stop and frisk created by the Terry decision was designed to strike that delicate balance.

B. The Stop

The purpose of making an investigative stop is to prevent and deter crime by identifying criminal suspects. An officer may wish to stop a citizen for questioning whenever such a course is necessary to the discharge of the

officer's duty. There are no fixed rules to follow in determining when, and if, a stop is necessary.

In order for an officer to lawfully stop an individual, the officer must have sufficient specific and articulable facts that would cause a reasonable, prudent and cautious law enforcement officer to suspect that:

1. A crime has been, is being, or is about to be committed,

   and

2. The person being stopped is involved in that criminal behavior.

The officer must be able to reach a reasonable and rational inference that the conduct or activity observed was connected to possible criminal conduct. Without this inference, the officer cannot lawfully stop the person. For example, the mere report of a crime does not justify the officer stopping every person within a ten-mile radius of the crime.

Once an officer makes a stop, federal law does not require the person being detained to answer any questions. People generally have an absolute right to ignore police officers and their refusal to talk does not provide probable cause for an arrest. Still undecided in the case law is whether an officer may require identification merely to learn or confirm identity during a reasonable suspicion stop, though this position seems unlikely to be approved.

There are, however, certain instances when the demand for identification or other documents by an officer who is lawfully present will require the suspect to produce such information, or be subject to further detention or arrest. For example, if the suspect is operating a motor vehicle, vessel, or aircraft, state or Federal law may require some form of permit or license for such operation. If state law requires that someone produce a form of identification to an officer who can lawfully request it for such a purpose, then the production is required.

Over the years, the courts have given us certain guidelines or factors which officers may use to determine whether reasonable suspicion exists. Each of these factors, standing alone, may not produce reasonable suspicion. However when used as building blocks in concert with other factors, they may reach the level necessary to allow an investigative stop. For example, the mere fact that an individual is in a high crime area is not sufficient for a stop, but when coupled with other facts, may support a stop.

The courts have held the following factors to be significant:

1. The suspect's reputation.

   If there is knowledge that the individual has a prior conviction for the suspected crime, this is a valid factor. Example: a person who has been convicted for making threats against the President is seen near the area the President is scheduled to make an appearance.

2. A report of a recent crime in the area.

   The kind of crime as well as how recently it occurred will both be relevant.

3. Time of day.

   Courts generally allow more leeway or latitude in investigative stops that occur after dark or late at night than they do for daytime stops.

4. Location.

   If the area is one of high crime, i.e., drug sales, car thefts, rapes, etc. it is a valid factor to consider. If the area is one that is generally closed or “off limits” to the public, a person's presence there may be a valid factor.

5. Suspicious or unusual conduct.

   If the actions of the person are such that they are unusual and consistent with certain types of criminal behavior, it may lead to reasonable suspicion. For example, an ATF agent working a moon shining case sees an individual driving down a backwoods road at night without the car lights on.

6. Prior information.

   If police have received a tip that a certain type of crime is to occur and the individual's conduct is consistent with that type of crime, this may lead to reasonable suspicion.

7. Behavior of the individual upon seeing a law enforcement officer.

   The individual may become nervous, may try to hide, or may rapidly leave the area. The Supreme Court considered the flight of a suspect after seeing a police officer a significant factor in determining reasonable suspicion.

8. That the suspect fit a specific profile of a known criminal type.

   The Supreme Court has been consistent in saying that the use of a profile is not enough by itself to create reasonable suspicion supporting an investigative stop. There is nothing special about a profile. United States v. Sokolow.

It is therefore important that in writing reports, an officer includes all the factors which justified a detention of the suspect. These factors may be

based upon the officers observations, information received from other sources, expertise, training, experience, other factors mentioned above, or a combination of them. From these facts will derive the officer's effort to sustain his or her actions.

C. The Detention

The courts have held that once officers stop an individual for an investigation, they may only detain that individual for a reasonable amount of time, which the facts and circumstances of each situation determine. By the definition of "detention," one is limited to a short, temporary period of time. Once officers have stopped an individual, they may continue the detention only for that time that is reasonably necessary to accomplish the purpose of the stop. For example, if officers stop a vehicle for a suspected equipment violation, they may detain it only long enough to investigate that suspected violation and to issue a citation if necessary. At the end of the stop, the officer may ask for consent to continue other investigations, but if the subject refuses consent the officer must release the person. If officers detain the vehicle any longer, without other evidence suggesting the possible existence of other violations, evidence obtained during this period is inadmissible in court.

Likewise, officers who stop an individual for a traffic violation and discover that they cannot verify the person's license, etc., due to the police computer being out of service, cannot hold that person some extended time until the computer is back on line. If, on the other hand, further suspicious facts are brought to the officer's attention during a period of lawful detention, this can justify detaining the individual until the officer can also investigate those facts.

The key to the reasonableness of the duration of the detention is whether the officer's intrusion into the detainee's rights was as brief and non-intrusive as possible while still accomplishing the purpose of the stop. If the investigation could have been done in a less intrusive manner or in a shorter period of time, the detention may be unreasonable.

While some force may clearly be used to detain a person, the courts have given no general rule as guidance other than that the force used must be reasonable under the facts and circumstances existing at the time of the incident. To be reasonable, the force used should be that minimally necessary to assure compliance with the officer's lawful commands.

Factors to consider in determining reasonableness include:

1. The seriousness of the crime being investigated and the strength of the facts supporting the officer's reasonable suspicion for the stop.

2. The number of suspects and the number of officers.

3. Reasonable suspicion to believe that the suspect is armed and dangerous.

4. The resistance displayed by the suspect(s).

D. The Frisk

A "frisk" is a " . . . limited search for weapons, generally of the outer clothing, but also of those areas which may be within a suspect's immediate control." Terry v. Ohio. The objective of a frisk is to discover weapons that the detainee may use to assault the officer or others. The scope of the frisk should be the minimum necessary to discover weapons and should be initially confined to a patting of the person's outer clothing and containers within their immediate control. A frisk, by definition, is limited to seeking hard objects that could be dangerous to the law enforcement officer and *is not to be used to discover either evidence or contraband.*

The scope of the frisk is limited due to its nature of being a "search" within the meaning of the Fourth Amendment. Just as a "stop" is a seizure, a "frisk" is a search for which there must be a reasonable basis in fact. The purpose of a frisk is to protect an officer from an unexpected assault, but the frisk may

only be done when there is an adequate basis to believe that a person may be armed and dangerous.

That determination is made on the "reasonable suspicion" standard, meaning that an officer must have specific and articulable facts leading to his belief that a person is armed and dangerous. It must be more than a subjective belief by the officer. There must be an objective basis for that belief.

If, during a frisk, officers feel a hard object that they reasonably believe to be a weapon, they may then reach into that area of the suspect's clothing to retrieve it. If the item turns out to be evidence of a crime, it is admissible against the defendant because the officer was lawfully present when the evidence was found.

It is not necessary for an officer to be certain that an individual is armed to conduct a frisk. The officer must only have a reasonable suspicion based upon specific and articulable facts. Some factors that can suggest that a person is armed and dangerous are:

- The reputation or record of the individual being detained.
- A bulge in the suspect's clothing which suggests the presence of a weapon.
- A quick or furtive movement by the suspect, or a movement into an area where the suspect may conceal a weapon.
- The demeanor of the suspect.
- The type of offense.

Reasonable suspicion that an individual is armed and dangerous can be developed from the very nature of the crime itself or from other factors. Certain crimes are by their very nature considered to involve the use of

weapons or items that could be used as weapons. Therefore, anyone suspected of being involved in those crimes can also be assumed to be armed and dangerous. The crimes include armed robbery, murder, terrorist acts, firearms violations, burglary, large scale drug deals and most likely rape.

On the other hand, some crimes do not by their nature involve the use of weapons. Therefore, an officer must articulate additional facts producing a belief that a person is armed and dangerous before conducting a frisk. Examples include fraud, bribery, mere drug possession and tax evasion.

Courts have granted officers more leeway in their decision to frisk suspects when they have made stops at night or in high crime areas. In any event, an officer must have specific, articulable facts to point to that caused the officer's suspicion. Pennsylvania v. Mimms. As stated by the Court in the Terry case:

> *The officer need not be absolutely certain that the individual is armed; the issue is whether a reasonably prudent man in the circumstances would be warranted in the belief that his safety or that of others was in danger . . . And in determining whether the officer acted reasonably in such circumstances, due weight must be given, not to his inchoate and unparticularized suspicion or "hunch," but to the specific reasonable inferences which he is entitled to draw from the facts in light of his experience.*

Officers should be aware that if their "frisk" was excessive in nature, the courts may hold that the detention ceased being an investigative stop and became an arrest. Should this be the case, the officer is required to show the higher standard of probable cause for the arrest and subsequent search.

If, during a frisk, an officer feels something which they do not believe to be a weapon, but the incriminating nature of the object (such as drugs wrapped in particular ways, hypodermic needles, etc.) is immediately apparent, the officer may then reach in and remove the object. Minnesota v. Dickerson. It is important that the nature of the object be immediately apparent to the

officer, without continued manipulation, for the evidence seized to be admissible in court.

A lawful frisk allows law enforcement officers to be lawfully "present" to touch the object. Its "immediately apparent" criminal nature gives the officer probable cause that it is evidence of a crime (which conforms to the "plain view" principle set out below). Under the "plain touch" doctrine, the officer may then lawfully seize the evidence. This recognizes that touch can also produce probable cause, just as observations, sounds, and smells, may do.

Just as we may frisk an individual for weapons based upon reasonable suspicion, should that individual be in a vehicle, we may also frisk that vehicle. The frisk of a vehicle is limited to the passenger compartment, i.e., those areas which may be reached from inside the vehicle, and include any closed but unlocked containers. Therefore, with reasonable suspicion to frisk an individual, an officer may also frisk the vehicle in which the suspect was driving or riding, including the unlocked glove box or console. The officer may frisk other closed but unlocked containers such as briefcases, duffle bags, etc. The rationale for including the vehicle in the frisk is that if the person is eventually released, they may re-enter the vehicle and the officer should know whether there are any dangerous weapons. Michigan v. Long.

The issue arises about whether or not an officer with adequate reasonable suspicion to stop and frisk an individual on the street may also frisk a container being carried by that person. To date, the matter has not been decided by the Supreme Court and there is a difference of opinion among the circuits. Some circuits hold that officer safety can be adequately protected by separating the person and their container during the stop. Other circuits hold that the situation is analogous to a vehicle stop and a frisk of the container is justified.

Officers that conduct a frisk of a container should use a "crush and feel" technique for a soft-sided container. If the container is hard sided and unlocked, then the officer may open the container and frisk the contents for weapons. Locked containers are not considered immediately accessible, so

they do not present the same degree of risk as unlocked containers. It is unlawful to frisk locked containers without consent.

VI. ARREST WARRANTS

A. Arrest Warrants

The validity of an arrest depends on the existence of probable cause to make that arrest. In general, if an officer has probable cause, the officer may make an arrest without a warrant although (1) there was ample time to obtain an arrest warrant and failed to do so, or (2) the warrant was defective. In other words, the legality of an arrest is judged by whether there was probable cause and not by the existence of a warrant or the validity of that warrant. Naturally, the arresting officer should be mindful of whether such an arrest is within the scope of the officer's statutory authority.

IPO 4 - Recognize when a warrant is required to conduct an arrest

Although officers may arrest on probable cause without a warrant, courts prefer officers to obtain warrants when possible. The Supreme Court's reasoning is that obtaining a warrant permits a "neutral and detached" magistrate judge to consider the issue of probable cause. Obtaining a warrant is beneficial to the officer also in that it provides a degree of protection from possible civil suits, and it allows the "good faith exception" to operate.

Under federal law, a magistrate (or other authorized judicial officer) may issue an arrest warrant based on:

1. A criminal complaint--see Rule 3, Federal Rules of Criminal Procedure. Law enforcement officers may obtain arrest warrants by filing a sworn complaint before a magistrate judge. The probable cause statement may be based upon hearsay evidence either in whole or in part.

2. An indictment by a grand jury.

3. An information by the United States Attorney.

4. An order of the court.

5. A federal violation notice.

6. A probation violation petition.

A good practice is to obtain an arrest warrant when practicable, but bear in mind that the issuance of a warrant by a court "commands" an officer to arrest the named individual should the officer come across that individual. Thus, to secure a warrant when further investigation, especially undercover work is involved, could be premature, possibly upsetting the case.

B. Arrest Warrants Required

To lawfully arrest a suspect in their home, an officer must first lawfully gain entry into that home to look for the suspect. This is a search within the intent and meaning of the Fourth Amendment. Therefore, unless exigent circumstances exist or the officer makes entry with consent, the officer must obtain an arrest warrant.

Courts have held that the right to seize the body of the defendant (an arrest) attaches the right to enter the defendant's property to specifically look for the defendant (a search). The rationale is that the entry into the property is a lesser intrusion of an individual's Fourth Amendment rights than is the arrest and therefore the greater permits the lesser. However, to enter the defendant's home with an arrest warrant, officers must have a reasonable belief that the defendant is there. Payton v. New York.

An arrest warrant alone will not authorize entry into the home or office of a third person for looking for and arresting a suspect, unless exigent circumstances exist or an officer obtains consent of the third person. An arrest of a suspect in a third person's home generally does not violate any of

the suspect's rights. It does, however, violate the constitutional rights of the third person to be secure from unreasonable searches and seizures.

Therefore, an officer should not unlawfully enter a third person's premises to arrest a suspect. Evidence or contraband linking the third party with a crime will be suppressed as to the third party. The best practice is to obtain a search warrant for the property to search for the suspect. Steagald v. United States.

Search warrants for a third party's premises places time limitations on the searching officers (as all search warrants do). Search warrant executions must be initiated after 6:00 a.m. and before 10:00 p.m., unless the issuing magistrate judge authorizes other times. An unlawful entry into a third person's home leaves an officer open to possible civil suit for violating that third person's constitutional rights.

C. Exigent Circumstances Entry to Make an Arrest

An officer may enter a private residence, business, etc. without either an arrest warrant or a search warrant if exigent circumstances exist. These include public welfare emergencies, the imminent destruction of evidence, and hot pursuit.

In “hot pursuit” to make an arrest, an officer may enter a private place to effect the arrest when:

1. There exists probable cause to arrest the person for a crime;

2. The officer must generally have a continuous knowledge, within reason, of the suspect's whereabouts, (i.e., the officer must be in the suspect's presence, but does not have to have the suspect in view);

3. There exists the need for the officer to act with speed; and

4. There is probable cause to believe that the suspect is in the particular premises the officer enters. Welsh v. Wisconsin.

Note however, that "hot pursuit" need not just be on the highways and byways, but can also occur as the result of the subject's moving just a few feet from public exposure into a protected premise. For example, a suspect standing on the threshold of the doorway of her home was "in public." An officer saw her there who had probable cause to arrest her for a felony. The defendant went into her house. The Court held that the officer's pursuit inside and subsequent arrested had entered lawfully. Evidence seized from the entry was admissible, since the Court did not require a warrant for the entry. United States v. Santana.

D. Warrantless Entry by Consent

An officer may make a warrantless entry into private premises if the officer has first obtained valid permission from a person capable of giving consent. This means that the person granting consent must have the legal ability to consent and must exercise dominion or control over the premises to be searched. The consentor must voluntarily give consent. Illinois v. Rodriguez; Bumper v. North Carolina.

The person must be of an adequate age to understand what it means to consent and must have a degree of control over the property. For example, a motel clerk may not consent to a police entry into a room currently leased by a motel guest, as the guest is the one who exercises the control. Stoner v. California. In a similar vein, a child may not consent to police entry into the parental home if the child is too young to understand the issue involved in granting consent.

E. Arrests Without Warrants

At common law a peace officer was authorized to arrest a person for a felony without first obtaining an arrest warrant whenever there was "reasonable grounds to believe" that a felony had been committed and that the person being arrested committed the crime. The terms, "reasonable grounds to believe" and "probable cause" are substantially the same standard. Draper v. United States.

IPO 5 - Recognize situations in which an arrest is lawful without a warrant.

The same rule applies today. Law enforcement officers may make warrantless felony arrests on the same evidence that the law would require for the issuance of an arrest warrant. In other words, the probable cause standard is the same for both warrantless arrests and arrests with a warrant.

An officer does not need to have personal knowledge of all the facts producing probable cause. The officer may use the collective knowledge and information of all officers. The arresting officer must know, however, that there are facts in existence establishing probable cause before the officer may act.

The common law rule with respect to warrantless arrests for misdemeanors were quite different. The law required a warrant unless a breach of the peace occurred in the presence of the arresting officer. Today, statutes permit a law enforcement officer to arrest for a misdemeanor committed in the officer's presence, without having to first obtain a warrant.

In sum, then, officers may make arrests without warrants in a public place:

- if the crime is a misdemeanor, and was committed in the presence of the arresting officer; or
- if the crime is a felony.

Officers may make felony arrests when they have statutory authority over the offense and facts sufficient to constitute probable cause. Either personal knowledge or the collective knowledge of other officers can form probable cause. The arrest is legal even where there was ample time to obtain a warrant but the officer has failed to do so.

As for misdemeanors, besides statutory authority and probable cause requirements, it is also necessary that the offense occur in the law enforcement officer's presence (i.e., within sight or other senses). Some jurisdictions, however, allow arrests without warrants to be based upon hearsay for designated misdemeanors; e.g., the District of Columbia Code.

If an officer makes an arrest without a warrant it will be necessary to file a criminal complaint (assuming no indictment or information has been filed) at the time the officer takes the defendant to court for the initial appearance. The better practice is to obtain an arrest warrant in advance when possible. By doing so, the officer may then rely on the "good faith" rule supporting arrest warrants and will have diminished any possible liability.

VII. SEARCH WARRANTS

IPO 5 – Identify the scope of a lawful execution of a warrant

Officers should not routinely rely on the exceptions to the warrant requirement to make searches. Whenever possible, a valid, judicially approved search warrant should be obtained before officers intrude on an individual's expectation of privacy to obtain evidence. The Fourth Amendment to the Constitution and Rule 41 of the Federal Rules of Criminal Procedure governs the procedures for obtaining search warrants.

A. Property and Persons Seizable with a Warrant

Rule 41(b) provides for the issuance of a warrant to seize: (1) property that is evidence of the commission of a criminal offense; (2) property that is contraband, the fruits of a crime, or otherwise criminally possessed; (3)

property designed or intended for use or which is or has been used as the means or instruments of committing a criminal offense; or, persons for whose arrest there is probable cause. Therefore, any property or person can be the subject of a valid search warrant if it (or they) falls into at least one of these broad categories.

B. Warrants Issued on Oral Testimony

Rule 41(c) (2) provides that a Federal search warrant may issue upon oral testimony or other appropriate means (e.g., electronic devices such as telephones and fax machines). The Rules allow this when circumstances make it reasonable to dispense with a written affidavit. To apply for a warrant based on oral testimony, such application would usually be over the telephone. The officer must prepare a document known as a duplicate original warrant and read it verbatim and under oath to the magistrate judge. The magistrate judge enters what is read on a document known as the original warrant. In the process the magistrate judge may modify the warrant. If officers use a facsimile transmission device, the papers may be sent in this manner, but a telephone call will still be a required part of the process because the officer must be placed under oath.

Once satisfied that the circumstances are reasonable to dispense with a written affidavit and that probable cause exists, the magistrate judge orders the issuance of a warrant by directing the officer requesting the warrant to sign the magistrate judge's name on the duplicate original warrant. The probable cause finding for a warrant upon oral testimony may be based on the same kind of evidence as is sufficient for a warrant upon an affidavit.

C. Execution of the Search Warrant

Officers will normally serve search warrants in the daytime, which Rule 41(h) defines as 6:00 a.m. to 10:00 p.m. according to local time. A search that begins during the daytime may extend past 10:00 p.m. if such extension is reasonably necessary to complete the search. Rule 41(c)(1) provides that, if the issuing magistrate judge finds reasonable cause from facts presented in

the affidavit, the magistrate judge can, by appropriate provision in the warrant, authorize execution at any time.

Rule 41(c)(1) also states that the officers shall conduct the search within a specified time not to exceed 10 days. If, for some reason, the officers have not executed the warrant within the specified period, it is no longer valid. The officer must resubmit the factual basis for probable cause to the magistrate judge.

D. 18 U.S.C. § 3109 - "Knock & Announce"

Deeply rooted in Anglo-American law is the requirement that, before forcing entry, law enforcement officers must announce their identity and purpose and allow the occupant to open the door voluntarily. Section 3109 of Title 18 provides: "The officer may break open any outer or inner door or window of a house, or any part of a house, or anything therein, to execute a search warrant, if, after notice of his authority and purpose, he is refused admittance or when necessary to liberate himself or a person aiding him in the execution of the warrant." Courts have held that this section applied to all entries under color of law, either to search or to arrest, and either with or without a warrant. The officer must announce both the officer's *authority* and *purpose*. Merely saying "Federal agents" is not sufficient. The officer must also state that he or she has a search (or arrest) warrant.

The courts have given a broad construction to the terminology in the statute. Courts broadly construe the word "break" in the statute. Opening an unlocked door or using a passkey is "breaking" and thus will trigger the application of §3109.

The term "refused admittance" means that an officer must wait a reasonable length of time before forcing entry. There is no set minimum time. Officers must give the occupant time to open the door voluntarily. What forms a reasonable length of time will depend on the facts of the case, taking into account the size of the dwelling, the destructible nature of the evidence, the time of day, and the physical condition of the occupant

Occasionally, special circumstances will arise upon execution that will reduce the waiting time before forcing entry or even preclude the necessity for the announcement of authority and purpose. Of these "exceptions," the most frequently encountered is the so-called "fleeing footsteps" exception. Hearing footsteps receding from the door is an indication that entry has been refused by implication, and the officer need wait no longer.

Also occurring in some cases is the situation where the officer sees or hears indications of the destruction of evidence, e.g., paper crackling in flames or a toilet being flushed repeatedly. An officer need not wait until the occupants destroy evidence but can enter upon reason to suspect that delay would lead to the destruction of evidence. Richards v. Wisconsin. On the other hand, the mere fact that the evidence sought is easily destructible, e.g., narcotics, will not suffice.

If compliance with §3109 would be manifestly a "useless gesture," e.g., when officers pursue a suspect from the scene of a crime to a house under the "hot pursuit" exception to the warrant requirement, there will be no need to announce authority and purpose. This type of situation, however, is unusual and should not be relied upon except under clear of circumstances.

Most Circuit Courts have approved entry by ruse or deception. Officers must effect such entries, however, without any force at all. The danger of discovery before or during entry should preclude resort to this type of entry unless absolutely necessary, e.g., when confronted by a fortified door in a case involving easily destructible evidence.

The word "house" appears in the statute. Some circuits have accordingly limited the application of §3109 to dwellings. Other circuits, however, have extended the meaning of "house" to cover such structures as offices, smokehouses, and barns. Officers therefore should be familiar with the rule in their areas of operation when contemplating the entry of such buildings.

E. Areas to Be Searched

Once the officers executing the warrant have gained entry to the premises and secured the area to be searched, then the search for the items specifically described in the warrant will commence. When officers exceed the limits of their warrant by searching areas not covered by the warrant, searching for items not specified in the warrant, or remaining on the premises after the search is completed, they violate the defendant's expectation of privacy. Evidence obtained from these actions will be suppressed.

The search warrant restricts the authority of the searching officers to a search of only those places in which the items described in the warrant could be concealed, and the search may not exceed that scope. For example, if officers are searching for a stolen large screen color television set, they could not search in dresser drawers or the kitchen breadbox, a bathroom medicine cabinet, etc.

If the warrant for the premises is properly drawn, it will authorize a search of all containers and personal property, including the resident-suspect's vehicles found on the curtilage that could conceal the items sought. If the suspect's car is parked off the premises, the officers cannot search it under the premises warrant. However, other reasons may justify the search, e.g., consent or independent probable cause. If a social visitor's vehicle is parked on the premises, officers cannot search it under the premises warrant. Consent or another justification is required.

Generally, officers may seize only those items particularly described in the warrant. There are some limited exceptions, however. Where the description section of the warrant contains language such as “and all property that constitutes evidence of the offense,” those items found during the search that constitute means and instruments, fruits, or evidence of the offense for which the warrant is issued may be seized although not specifically described in the warrant. The items searched or seized must appear to have some logical relationship or “nexus” to the purpose of the search. For example, in conducting a search for marijuana in a suspected drug dealer's apartment, if officers find a residue of marijuana, a quantity of plastic bags, a set of scales,

and a personal diary all on the kitchen counter, they may examine and seize all the items. The residue is seizable because the warrant specifically lists it. The plastic bags and scales are seizable because they are the means and instruments of the offense of dealing in marijuana. The officers have a right to search the personal diary although it is not an item particularly described in the warrant. There is a logical nexus between the diary and the offense due to its proximity to other evidence and the fact that believing that a dealer in marijuana will record transactions is reasonable. If the search of the diary confirms the record of transactions, then officers may seize it under the authority of the warrant.

When the last item specified in the warrant is found or the officers have exhausted all reasonable efforts to uncover the items to be seized, then they must leave the premises after making an inventory of items seized. The authority of the warrant to intrude on an individual's expectation of privacy extends only as long as is reasonably necessary to search. Officers who remain on the premises for an unreasonable period become trespassers.

F. Persons at the Scene of Premises

The issuance of a search warrant for premises does not automatically give officers the authority to search or arrest all persons found on the premises. Probable cause that a particular person has secreted items sought in the search warrant on him or herself may lead to a search of that person. However, if there is evidence to believe that certain persons will have items on their persons at the time of the execution of the search warrant, the warrant should indicate in advance that such a search is to take place.

Personal articles carried by persons on the premises may or may not be considered part of the premises for the purpose of being covered by the warrant. The most important aspect of the question of why one's personal possessions are on the premises. The courts will look into the degree of privacy that a certain person retains on the searched premises. Persons do not give up their expectation of privacy just because they happen to find themselves on a premises subject to a search warrant. The courts also will consider whether the person has a special relationship to the premises and

whether the original probable cause for the issuance of the search warrant reasonably comprehended within its scope the personal property to be searched. For example, if officers arrive at a premises to search for stolen government property and find a salesperson on the premises with a sample case, a search of those possessions may not be justified. On the other hand, if a container on the premises belongs to a coconspirator, several possibilities exist to justify a search: consent; search incident to arrest; telephonic search warrant; or under the premises warrant. Generally, if personal property such as suitcases, purses, briefcases, etc., are found unattended on a premises being searched, then the officer may search these items without first attempting to identify the ownership if such items logically could contain the evidence sought under the warrant.

Officers conducting a lawful search under a warrant have authority to insure that they will conduct their search without forcible interference. Thus, officers may take any steps reasonable and necessary to protect the safety of themselves and persons and property under their control during their search. If an officer can articulate a reasonable basis for believing that a particular person may be armed and presents a threat to that officer or others, then that officer may conduct a limited Terry frisk of the individual.

Officers may detain a resident for a reasonable length of time without searching or arresting that resident while they conduct a search of that residence in cases involving contraband. In Michigan v. Summers, the resident was leaving as the officers approached. They required Summers to stay, and later arrested Summers after contraband was found. However, the Summers doctrine only applies if the resident is on or about the premises. If the resident is found several blocks away, this doctrine does not apply.

VIII. WARRANTLESS SEARCHES AND SEIZURES - PC REQUIRED

Courts have a strong preference that law enforcement officers secure search warrants before they conduct searches. However, this is not always possible or necessary. The Supreme Court has authorized various exceptions to the Fourth Amendment's warrant and probable cause requirements. The Fourth Amendment's overriding principle is a prohibition against unreasonable searches. While there remains a strong preference for search warrants supported by probable cause, the Supreme Court has never held that the Fourth Amendment always demands a warrant or even probable cause for searches to be "reasonable" within the meaning of that amendment. Presented in this section are exceptions to the warrant requirement the Supreme Court originally granted because of the need for expediency.

IPO 6 - Recognize situations in which a search or seizure is lawful without a warrant

Warrantless Searches and Seizure - Need PC

1) **Plain View**
2) **Mobile Conveyances**
3) **Destruction of Evidence**
4) **Hot Pursuit**
5) **Emergency Scenes**

A. Plain View

The plain view doctrine is an acknowledgment by the courts that a law enforcement officer lawfully engaged in the ordinary course of his or her duties is not required to wear blinders or close his or her eyes to that which they observe. Accordingly, when an officer has a legal right to be where he or she is and observes items that they immediately believe to be of an apparent incriminating nature, the courts will allow a seizure of those items without a warrant. The two necessary elements for a lawful plain view seizure are:

(1) the officer must be <u>lawfully present</u>,

and

(2) it must be <u>immediately apparent</u> that the item is of an incriminating nature

Officers must be justified in being positioned where they are at the time they make a plain view observation. If the officers are not in a place where they have a constitutional right to be, then courts will suppress their observations or any evidence seized. Officers may gain lawful presence by execution of a lawful arrest warrant, search incident to a lawful arrest, service of a lawful search warrant, consent, conducting interviews, etc.

IPO 7 - Identify the principles of the plain view doctrine.

Officers may legally walk up to an individual's front door to obtain directions, seek the whereabouts of an individual, conduct an interview, or even to request to use the bathroom. Nevertheless, in determining whether officers are legally on the premises, the courts place a heavy burden on the government to show that the entry was not a subterfuge to avoid the warrant requirement of the Fourth Amendment. If the court finds that the officer's action was actually designed to allow them to search without obtaining a warrant, then it will suppress any observations or seizures.

Note that there is a difference between a seizure justified by plain view and an observation based on open view. A plain view seizure of evidence is justified only when the officer is lawfully intruding on a person’s reasonable expectation of privacy (through consent, a warrant, etc.). For example, where officers are already lawfully in a suspect's home to execute a search warrant for counterfeit currency and they discover a moonshine still, they are justified in seizing the still under the plain view doctrine. They have violated no further expectation of privacy. Yet if officers make a lawful observation from a neighbor's property into the open window of a suspect's house and observe growing marijuana plants, they may not enter the suspect's house and seize the plants. The open view observation provides probable cause for an

arrest of the suspect or the issuance of a search warrant but does not authorize a warrantless entry of premises to search without a warrant in this situation.

The officer making a seizure under the plain view doctrine must have probable cause to believe, without further investigation, that the item in plain view is evidence. For example, if officers go to the home of a known convicted felon for an interview, are admitted to the premises, and see a pistol lying on a table during the interview, they may seize the pistol because it is evidence of the crime of possession of a weapon by a convicted felon that is immediately apparent to them.

B. Searches of Vehicles, Vessels, and Aircraft - the Carroll Doctrine

The mobile conveyance exception to the Fourth Amendment's warrant requirement authorizes the search of mobile conveyances based on probable cause to believe it is carrying items subject to seizure (contraband, means and instruments of a crime, etc.). Conveyances include automobiles, trucks, airplanes, boats, and common carriers. In such a situation, seeking a search warrant is not practical before stopping and searching the conveyance. The original rationale for this warrantless search is that the conveyance and its articles could be hidden, destroyed or removed from the court's jurisdiction before officers could secure a search warrant. The Supreme Court now only requires that a law enforcement officer demonstrate that the conveyance is mobile and that probable cause exists to conduct a search to approve a warrantless search under the mobile conveyance exception. Mobile conveyance searches are justified even if law enforcement officers had time to secure a search warrant. United States v. Johns; Pennsylvania v. Labron; Maryland v. Dyson.

This exception is often called the "Carroll Doctrine" after the case of Carroll v. United States, in which the Supreme Court first recognized the exception. The Court stated that officers may stop and search a vehicle, for which probable cause exists to believe it contains items subject to seizure, without a warrant if it is actually or potentially mobile. The Supreme Court also

noted that mobile conveyances have a reduced expectation privacy in the motor vehicle, as they are subject to pervasive regulation. In such a case there is a "fleeting opportunity on the open highway" to obtain the evidence and obtaining a warrant is impractical.

The mobile conveyance exception to the Fourth Amendment's warrant requirement established in Carroll applies to searches of vehicles in which there is probable cause to believe contain evidence of a crime. Once officers have met the requirements for a Carroll search, then they may make a warrantless search that is as thorough as a magistrate judge could authorize with a warrant. Where law enforcement officers have probable cause to search a vehicle, they may conduct a warrantless search of every part of the vehicle, including all containers and packages, (locked or unlocked) that may conceal the object of the search. The search is limited by the object of the search and the places in which there is probable cause to believe that it may be found. For example, probable cause to believe that a suspect is transporting illegal aliens in a van will not justify a warrantless search of the ashtray.

However, if officers have probable cause to believe that evidence of a crime exists in a specific container, and further have probable cause that the container is in a mobile conveyance and that conveyance is found in public, officers may search the vehicle for the container. When found, the container may be opened and searched without a warrant. Probable cause as to the container would not support a general search of the vehicle beyond that necessary to find the container. California v. Acevedo. Note that if the container reveals its contents by sight there is no reasonable expectation of privacy (e.g., a transparent bag, gun case).

The Supreme Court has extended the permissible time in which officers must make a search of a vehicle under the mobility exception. If there is probable cause to search a vehicle at the moment the seizure occurs, e.g., at the scene of the stop, or arrest of the driver, the officers can conduct a search at that place or remove the vehicle to a better, more convenient, or safer location to search. This is true although the officer could, after taking possession of the vehicle, hold it and obtain a valid search warrant. Being moved by the

officers does not lessen the probable cause to believe that the vehicle contains items subject to seizure. For example, where officers have stopped a vehicle with probable cause to believe that its driver was involved in an armed robbery and that fruits of that crime and other evidence is in the vehicle, they may arrest the driver. Officers may either search the vehicle on the street or take the vehicle to a well-lighted parking lot or the police garage and conduct a search there.

C. Destruction of Evidence

Sometimes officers are confronted with a situation where an immediate search is necessary in order the prevent the loss or destruction of evidence but there is insufficient time to obtain a search warrant. To justify a search under the destruction of evidence, or exigent circumstance exception, the law enforcement officer must have probable cause to search. Both the exigent circumstances and the probable cause must exist at the time of the search. Exigent circumstances alone will not justify a warrantless search.

If an officer reasonably believes that a removal or destruction of evidence is *imminent* (there is not time to secure a search warrant) and probable cause exists that the area to be searched contains seizable evidence, the Supreme Court has authorized a warrantless search. Courts have applied this exception where officers on surveillance overheard a conversation in the next room that led them to believe that the occupants had cut and packed heroin there and was about to be removed. The subsequent emergency entry and seizure of the heroin were found reasonable. There must be probable cause to believe that evidence is about to be removed or destroyed. The courts have held that the risk of delay or an inconvenience to the officers does not justify a warrantless search and seizure.

Rule 41(c)(2) of the Federal Rules of Criminal Procedure provides for a search warrant based on oral testimony expressed by telephone or facsimile (fax) machine from agents in the field to a magistrate judge. This procedure may drastically reduce the time it takes to obtain a search warrant. The effect could be therefore that some situations formerly considered *exigent* due to the practical considerations of the time it would take to physically obtain a

search warrant may no longer be so urgent because officers can obtain a warrant over the telephone in a relatively short period.

D. Hot Pursuit

The necessity and legality of conducting a "hot pursuit" search occur when officers want to continue the pursuit of a suspect into an area of privacy. They do not have to see the suspect enter the area (commonly a dwelling) but must have information that the suspect has entered the house moments before. In these cases, speed is essential. Only a thorough search for persons and weapons can insure that the suspect is found and that any weapons that could be used for attack or escapes are secured.

The requirements for a valid hot pursuit search are:

- probable cause to arrest
- felony
- pursuit begins in public
- officers maintain a general and continuous knowledge of suspect's whereabouts

The permissible scope of the search may be only as broad as is reasonably necessary to prevent the suspect from resisting or escaping. The officer is not entitled to continue the search, however, once it becomes apparent that the house is vacant or that there is no longer a danger to the officer or others. Where officers entered a hotel room into which they had been advised that an armed and dangerous person had fled, the court found that a search of a suitcase in the room was not reasonable after they established that the room was vacant.

E. Emergency Scene

There are many occasions when officers receive a call to a burglary, robbery, shooting, stabbing, fire or explosion that is occurring inside a premises. Government agents do not have time to obtain a search warrant to justify an entry into a premises to respond to the emergency. However, their

warrantless entries into these areas protected by a reasonable expectation of privacy are "reasonable" within the meaning of the Fourth Amendment. During this period, evidence observed in plain view is admissible. However, once the emergency is over, a continued search without consent or warrant is to be considered a separate search.

In Thompson v. Louisiana, a wife shot her husband and then took sleeping pills. Before she passed out, the woman called her daughter and told her what had happened. The daughter called the police who responded immediately but obviously without a warrant. Government agents rushed the husband and wife to a hospital where a doctor pronounced the husband dead. His wife, however, recovered. The Court held that the warrantless entry into the home was permissible to prevent further crime and to help injured persons. Any evidence found during this phase was admissible under the plain view doctrine. However, the Court held that after the government took the husband and wife to the hospital the emergency that allowed the officers to enter the premises no longer existed. Therefore, the officers' exception no longer existed. They had to depart the premises. This ruling was followed in Flippo v. West Virginia. Under circumstances such as these, the Supreme Court held that a premises can be secured to protect the evidence while awaiting the arrival of a warrant. Segura v. United States.

IX. WARRANTLESS SEARCHES AND SEIZURES - PC NOT REQUIRED

Warrantless Searches and Seizures No P.C. Needed
1) Frisks
2) Searches Incident to Lawful Arrest
3) Consent
4) Inventories
5) Inspections

Over the years, the Supreme Court has developed a select few instances where it will permit the government to conduct a search although the government has neither a warrant nor probable cause. These limited searches are permissible because the officer conducting the search is pursuing a specific government interest and, typically, the intrusion on the suspect is not very great. While engaged in lawful execution of these searches, plain view seizures are reasonable.

A. Frisks

A frisk is a limited search (for weapons) that the Supreme Court has permitted based on something less than probable cause (reasonable suspicion a person is armed and dangerous). For a further discussion, see section above.

B. Searches Incident to Arrest

One of the best known and often used exceptions to the probable cause and warrant requirements of the Constitution is the right of a law enforcement officer to conduct a search incident to a lawful arrest. The right to search under this exception is based on the legality of the arrest itself. If a court subsequently holds that the arrest is illegal, then any search incident to that arrest will also be invalid.

The general rule established by the Supreme Court is that incident to any lawful arrest an officer may contemporaneously search both the arrestee's

person. This search includes the immediate area into which the arrestee can reach to obtain weapons, means of escape, and any evidence that he might conceal or destroy.

An officer can make a complete search of the arrestee's person no matter the type of offense for which the person is arrested or the circumstances in the case. The officer making the search does not have to articulate any expectation of finding evidence. If officers arrest an individual for failure to appear for a traffic citation, they may search the entire person and if counterfeit currency is found, it will be admissible as evidence.

The Supreme Court has held that the lawful search of the "person" includes a search of those items immediately associated with the person of the arrestee. Therefore, clothing and small containers carried on the person are also subject to examination under the authority of the search incident to arrest, e.g., a man's wallet, a woman's purse, an eyeglass case, a cigarette package, a pill box, etc.

The exact area around an arrestee that officers may search for weapons and evidence is generally limited to the "arms length" or "lunging distance" area into which the individual could reasonably reach. The arrest of an individual in a living room would not justify a search incident to that arrest of other rooms of the house. However, in Maryland v. Buie the Supreme Court has allowed officers to look into areas adjacent to the area where they arrested the defendant to determine if there were persons concealed there who might harm the officers or aid the defendant's escape (often called a "protective sweep"). The officers may open doors that lead from the arrest site into other rooms or closets and make a cursory look for persons. If officers develop reasonable suspicion that persons are elsewhere on the premises, such as the sound of footsteps or the flush of a toilet is heard, they may look in those areas for people that may interfere with their lawful duties.

When officers enter premises to effect a lawful arrest, they should be mindful that other individuals may be present in the premises who pose a danger to the officers' safety or the safety of others. In Maryland v. Buie the Supreme Court authorized arresting officers to check the areas adjacent to

the arrest scene for persons that may pose a threat to security. This check does not have to be supported by any suspicion but is authorized because of the nature of the arrest and the inherent threats such scenes pose to law enforcement officers.

Where officers have a "reasonable belief based on specific and articulable facts which, taken together with the rational inferences from those facts, reasonably [warrant the officers] in believing that the area swept harbor[s] an individual posing a danger to the officer[s] or others," they may conduct a protective sweep of the entire premises. Maryland v. Buie. If the circumstances of the arrest suggest that someone inside the premises pose a danger to arresting officers, they may take steps to ensure that the premises where the person is being or has just been arrested is not harboring other persons who are dangerous or who could unexpectedly launch an attack.

The Supreme Court in Buie emphasized that

> *... such a protective sweep, aimed at protecting the arresting officers, if justified by the circumstances, is nevertheless not a full search of the premises, but may extend only to a cursory inspection of those spaces where a person may be found. The sweep lasts no longer than is necessary to dispel the reasonable suspicion of danger and in any event no longer that it takes to complete the arrest and depart the premises.*

The Court in Buie also said,

> *... as an incident to the arrest the officers could as a precautionary matter and without probable cause or reasonable suspicion, look in closets and other spaces immediately adjoining the place of arrest from which an attack could be immediately launched.*

The Supreme Court specifically held that when a law enforcement officer has made a lawful custodial arrest of the occupant of an automobile, the officer

may, incident to that arrest, search the passenger compartment of the automobile. New York v. Belton. This includes the contents of all containers found within the passenger compartment whether they are open or close. Such a search is contemporaneous even though the officers have removed the defendant from the vehicle, placed him in handcuffs, and secured him in a police car.

Officers must make a search incident to arrest at the same time and place as the arrest, i.e., it must be contemporaneous. Officers may make a lawful search incident to arrest even though the search precedes the actual words of arrest. However, in this situation, the officers must have pre-existing probable cause to arrest and the actual intent to make the arrest.

Other situations may arise that will authorize a valid search incident to arrest although slightly removed from the exact time and exact place of the arrest. It is reasonable to search any item that must necessarily be placed on the arrestee's person, e.g., warm clothing on a cold day, or within the arrestee 's immediate control, e.g., a diabetic's insulin kit. Officers may not, however, allow an arrestee to roam around or lead the person around to justify a search of every area into which he moves as incident to the arrest. Further, the requirement that a search of a person be contemporaneous is abated because custodial officers will search an arrested person again before being placing him or her in jail.

C. Consent Searches

IPO 8 - Identify the requirements of a valid consent search

An officer should not rely on consent if the officer has probable cause to obtain a warrant, unless an urgent situation renders the obtaining of a warrant (including a telephonic warrant) impractical. The test of the validity of consent is whether is was given in a voluntary manner and the consentor had the apparent authority to grant permission.

Whether consent is given freely and voluntarily is decided by the facts as determined by the court, which will consider all of the circumstances. One such circumstance is the consentor's knowledge of the right to withhold consent. Though courts have not required such knowledge, it us useful in proving a voluntary decision. Courts have not required officers to advise a person of their right to refuse consent nor, if they have detained the person, that they have a right to depart before they can grant consent to search. Ohio v. Robinette. Again, this information is useful in proving the voluntary behavior of the consentor.

The government has the burden of proving the voluntariness of consent. Naturally, this burden is especially heavy if the person is in custody. Consent does not need to be in writing, although a written consent is preferable to an oral one. If oral, the consent should be clear and specific.

Coercion applied by law enforcement officers will invalidate consent. Coercion may result from acts or words intended to induce an involuntary consent. The lower a person's intellectual or educational level or the less experience the person has had with the police, the more difficult will be the government's burden in proving that it obtained consent in a voluntary manner. Some people may lack the requisite capacity to consent altogether. On the other hand, well-educated, successful, or "streetwise" defendants will be hard-pressed to convince a court that they believed that they were obligated to consent.

Actual force or threats by officers can invalidate consent as with a confession, but, unlike confessions, deception will also invalidate the consent. Such practices as obtaining consent at gunpoint, telling the suspect that failure to consent will result in the loss of a job, or misrepresenting the purpose or scope of the search must be avoided.

Mere submission by the individual to the authority of the law enforcement officer does not constitute consent. Persons do not give valid consent in response to an officer's statement that the officer has come to search, or that the officer has a warrant when, in fact, there is none (or it is defective), or they will get a warrant if consent is withheld. On the other hand, it is

permissible for officers truthfully to advise a person that they will apply for a warrant if consent is refused.

The consenting person may limit consent in time, scope, and intensity. They may revoke consent at any time, although what has already been discovered before the revocation may be introduced in evidence or used as probable cause to obtain a warrant.

Consent to search a motor vehicle for an item such as narcotics implies a request to search those containers that could contain the item sought. For instance, a law enforcement officer was justified in looking in a brown paper bag found in the passenger's compartment after securing the owner's consent to search his car for drugs. Florida v. Jimeno.

If two or more persons share something, such as an apartment or a gym bag, each assumes the risk that the other will consent to a search. If two or more persons have common authority, access, and control over a place or thing, any of them can effectively consent to a search of it. Property law, i.e., legal title, is largely irrelevant. It is the guest and not the motel manager, or the tenant and not the landlord, who has the authority to consent.

If two persons are roommates, one of them can consent to a search of that person's own bedroom and such common areas as the kitchen and the living room. That person can probably not consent to a search of the roommate's bedroom. Likewise, a wife will have the authority to consent to a search of a closet that she shares with her husband but not of a locked box in that closet to which he alone has the key and to which she does not have access. On the other hand, the head of a household, e.g., parents, can normally consent to a search of their child's bedroom even though the parents' access may be limited.

A guest cannot normally consent to a search of a host's premises if the guest's occupancy is limited in time and scope. Conversely, a guest of indefinite duration with the "run of the house" has been held to have the authority to consent to a search of the host's premises.

If a person implies by word or action that they have authority to consent to a search of a given area, and officers reasonably rely on such impression, their search of that area is reasonable under the Fourth Amendment. The consent granted is acceptable under the legal doctrine of apparent authority.

D. Inventories

Once law enforcement officials lawfully have obtained custody and control of an automobile or other personal property, they may make an inspection of the automobile or personal property to record an inventory. They must make inventories according to a standardized agency or departmental regulations. South Dakota v. Opperman. The purpose of an inventory is:

IPO 9 - Identify the principles of a lawful inventory search

(1) to protect the owner's property;
(2) to protect the seizing officers from false claims; or
(3) to protect the officers or public from danger.

The scope of the inventory exception to the warrant requirement is limited. The scope of the inventory may not extend any further than is reasonably necessary to discover valuables or other items for safekeeping or protection. Officers are not justified in looking into the heater ducts or inside the door panels of an automobile because valuables are normally not kept in such places. In Colorado v. Bertine, the Supreme Court held that police could lawfully inventory a sealed envelope that was found in a backpack in a vehicle. The agency's standardized policy did not address how such containers were to be safeguarded. If officers discover evidence of a crime during a lawful inventory, the plain view doctrine will apply.

E. Inspections

The ability to conduct a lawful inspection is based on the authority to regulate, not the authority to seek out evidence of criminal activities. Therefore, for officers to justify their presence in a private area to "inspect," there must be specific statutory or regulatory authority for an inspection, and the scope of the inspection may not exceed that authority. If the court finds that the initial purpose of the entry was for a legitimate inspection, officers can seize lawfully and use any criminal evidence subsequently discovered as evidence in a criminal prosecution. However, officers may not attempt to use their inspection authority as a pretext to conduct a warrantless search for evidence.

IPO 10 - Identify the principles of a lawful inspection search

Usually, officers seeking to conduct a lawful inspection must do so with the consent of the person whose property or premises is to be inspected. If the occupants have denied entry, they must obtain an inspection warrant before force may be used. For example, an officer, who is refused admission to conduct an inspection of the premises of a license holder, must follow the procedures provided for by law or regulation. The officer may advise the individual of the penalties for the refusal of admission to seek consent to enter; or, the officer may leave the premises and seek administrative sanctions such as revocation of the license concerned, or imposition of a civil penalty; or the officer may seek issuance of a warrant to conduct the inspection.

Routine health, safety, and fire inspections of private dwellings and business premises require a warrant. Exigent circumstances will excuse a warrantless administrative or regulatory inspection. The Supreme Court has validated warrantless administrative inspections of liquor and firearms dealers conducted pursuant to federal statutes. In Marshall v. Barlow's Inc., the Supreme Court declared unconstitutional the warrantless inspection of businesses by the Occupational Safety and Health Administration because

many affected businesses had not been previously regulated or licensed and had no tradition of close government regulation.

The Fourth Amendment does not require that the government establish traditional “probable cause” or obtain a traditional search warrant to conduct a regulatory inspection. The inspecting officials must obtain a court authorized inspection warrant similar in format to a search warrant. The only elements required are: (1) that there is authority to conduct the specific inspection, (2) the official to perform the inspection has inspection authority, and (3) that the person's premises or facilities are subject to inspection pursuant to the regulatory scheme.

An inspection warrant does not confer any additional search authority on officers. Therefore, once they enter the premises, the scope of their inspection is limited to those activities that they could have performed under their inspection authority if entry had been obtained by consent. If officers have probable cause and a desire to conduct a search for criminal evidence, they must obtain a traditional Fourth Amendment search warrant.

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LEGAL PARAMETERS INTERVIEWING

DESCRIPTION:

This 6-hour block of instruction examines the issues involved in obtaining incriminating statements communicated by a person. The focus is on recent United States Supreme Court cases that determine when a person has the right to be protected against self-incrimination under the Fifth Amendment; when officers must give Miranda warnings; the criteria to be met for a valid waiver of Fifth and Sixth Amendment rights; when a person has a Sixth Amendment right to representation by counsel; and the limitations imposed on law enforcement officers when a person exercises Fifth or Sixth Amendment rights.

TERMINAL COURSE OBJECTIVE:

Students will identify Fifth and Sixth Amendment rights and the limitations imposed on law enforcement officers when a person exercises those rights.

INTERIM PERFORMANCE OBJECTIVES:

1. Identify when the privilege against self-incrimination exists.

2. Recognize when a Miranda warning must be given.

3. Identify the criteria to be met before a waiver of Miranda rights will be valid.

4. Identify limitations imposed on law enforcement officers when a person exercises Miranda rights.

5. Identify the limitations imposed on law enforcement officers when a person exercises their Sixth Amendment right to counsel.

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LEGAL CONSIDERATIONS OF THE INTERVIEW

TABLE OF CONTENTS

LEGAL CONSIDERATIONS OF THE INTERVIEW

I. THE FIFTH AMENDMENT

A. Introduction

The government increases the probability of obtaining a conviction if the jury hears an incriminating statement made by the defendant. Fortunately, statistics show that in many situations a suspect will voluntarily make an incriminating statement when interviewed properly. If officers obtain such a statement, the prosecutor will want to ensure that it will be admissible in a court of law. To achieve that objective, the officers must obtain the statement without depriving the suspect his or her constitutional rights. Consequently, the person must voluntarily make the statement regardless of whether we obtain an oral or written statement.

The Self Incrimination clause of the Fifth Amendment to the United States Constitution states:

> *. . . nor shall [any person] be compelled in any criminal case to be a witness against himself . . .*

During an interview, if a person has a constitutional right to be free from compelled testimony, the government cannot require such testimony. Circumstances exist, however, in which the person can (and sometimes, must) provide testimony. This protection does not apply to all incriminating evidence the government obtains from a person. The Fifth Amendment protection against self-incrimination applies only to testimonial evidence. It does <u>not</u> apply to nontestimonial evidence.

B. Nontestimonial Evidence

We are obtaining nontestimonial evidence when a person provides evidence that <u>tends to identify</u> the person in some physical way. Examples include:

1. Fingerprints, palm prints, and footprints;

2. Lineups, show ups, and photo arrays (proceeding must be "fair" or it violates "due process" clause);

3. Blood, urine, sperm, and saliva tests;

4. Bullet extractions;

5. Hair samples;

6. Handwriting exemplars and voice prints;

7. Modeling of clothing;

8. Uttering specific words.

A person has no basis, under the self-incrimination clause, to object to the compelled production of nontestimonial evidence. A permissible basis exists if other constitutional rights are violated such as:

1. Fourth Amendment (e.g., searching for and seizing evidence from inside the body without a search warrant or an appropriate exception to that requirement).

2. Fifth Amendment due process (e.g., not having a fair lineup, other conduct that may shock the conscience of a court.).

3. Sixth Amendment (e.g., conducting an interview after the right to counsel has attached and not allowing the attorney to be present).

C. Testimonial Evidence

Testimonial evidence is communicative in nature. It generally involves the thinking process, (i.e., it reveals knowledge). This includes:

- **T** Oral statements (e.g., where the suspect responds to questions rather than simply repeating words so a witness can make a voice identification);
- **T** Written statements (e.g., where the suspect communicates information rather than copying words for a handwriting identification);
- **T** Nonverbal statements (e.g., nodding the head in response to a question);
- **T** Conduct (if it is intended to communicate a thought). For example, if an agent asked a suspect to take the investigator to the location of the stolen property and the suspect responded by taking the agent to the location.

II. PRIVILEGE AGAINST SELF-INCRIMINATION

A. Basis of Privilege

The privilege against self-incrimination permits persons to refuse to answer questions put to them in any proceeding, whether administrative, civil or criminal, formal or informal, if the answers might incriminate them in future criminal proceedings. Garrity v. New Jersey; Gardner v. Broderick; Lefkowitz v. Turley (contractor threatened with loss of contract for refusal to answer questions).

IPO 1 - Identify when the privilege against self-incrimination exists.

A person is privileged also against being compelled to produce personal property (e.g., books or records) when such production would incriminate the person. (United States v. Doe). A court may compel a person to produce their personal papers if the government grants them immunity. In United States v. Hubbell the Supreme Court will decide whether the act of producing ordinary business records constitutes a compelled testimonial communication since the government could not identify the documents with reasonable particularity until produced. However, the self-incrimination privilege does not protect the contents of personal papers that the suspect created voluntarily.

A corporation is protected by the Fourth Amendment's prohibition against unreasonable searches and seizures but is not afforded protection under the Fifth Amendment's self incrimination clause. A court can compel the production of corporate records even when the custodian of those records is the only person involved in the operation of the corporation and the records will incriminate the custodian. The fact that the custodian produced the records will not be disclosed at the custodian's trial. Braswell v. United States.

A partnership is treated like a corporation for purposes of the self-incrimination clause of the Fifth Amendment. Bellis v. United States. NOTE: This might not be the case if the partnership were a small family operation.

B. When Does a Constitutional Violation Occur?

1. A Fourth Amendment violation occurs at the time the government takes the action; e.g., at the time of the illegal search or seizure.

2. A Fifth Amendment violation occurs at the time the government offers the compelled self-incriminating statement as evidence in a criminal trial.

C. When Is the Privilege Not Available?

Defendants that voluntarily testify waive the privilege from self-incrimination. Johnson v. United States.

The government can compel testimony if it has given immunity. Murphy v. Waterfront Commission of New York. There are two types of immunity, use immunity and transactional immunity. With use immunity, the government cannot use the witness' compelled testimony and information developed from it in any criminal prosecution against that person. However, it is not a bar to prosecution based upon evidence independent from the compelled testimony. Investigating officers should preserve the possibility of prosecuting the individual by identifying all known evidence before the immunized testimony. Transactional immunity affords immunity to the person from prosecution for the offense to which the person is compelled to testify. Kastigar v. United States.

The privilege does not apply to third party statements or records (e.g., bank records or an accountant's work papers). If a third party has the records, there is no self-incrimination privilege generally unless a privileged relationship exists or the third party claims the Fifth for themselves. Couch v. United States; Fisher v. United States (subpoena to attorney for papers given by accountant who was holding them for taxpayer); Andresen v. Maryland (use of search warrant in suspect attorney's office); Doe v. United States (bank customer required to sign a form authorizing foreign banks to disclose information about any accounts held for him).

Once the statute of limitations has expired, the privilege no longer exists. Likewise, no privilege exists after the person has been convicted and sentenced. However the Supreme court ruled that a guilty plea does not waive the privilege at sentencing. A court must not draw a negative inference from the silence of a person who has pleaded guilty but refuses to testify during sentencing. Mitchell v. United States. Also, no privilege exists due to the fear that a foreign government may prosecute the individual based upon his responses. United States v. Balysys.

D. Administrative Investigations

A statement obtained under a threat of loss of employment and related benefits is coerced and cannot be used in a subsequent criminal prosecution. Garrity, Gardner , supra. The government cannot coerce a waiver. Public employees can be compelled to answer questions concerning their employment only when the officer advises them that neither their answers nor their fruits can be used against them in a criminal case. Following such advice, their refusal to talk and cooperate can be cause for dismissal. Obtain a declination of prosecution from the AUSA before confronting the employee. Kalkines v. United States.

Because of Garrity, Gardner, Kalkines, and other decisions, a government employer can insist on answers or remove the employee for refusal to answer--IF the investigator adequately warns the employee both that the employee is subject to discharge for not answering and that their replies (and their fruits) cannot be used against them in a criminal case. The requirement is for a sufficient warning: advice/warnings as to constitutional rights; advice/warnings of options and the consequences of that choice; and an unequivocal declaration of "use" immunity.

According to a Department of Justice Policy (June 4, 1980 but apparently still valid), the procedure to be followed in administrative investigations of employee misconduct is as follows:

1. If an employee is merely allowed to respond to questions regarding job related misconduct, any statements would not be "compelled" in violation of the Fifth Amendment. But if the government requires the employee to answer questions, then the answers are compelled and cannot be used, including evidentiary leads, in any subsequent criminal proceeding.

2. The investigator should give the following warnings when he or she requests an employee to provide evidence on a voluntary basis:

a. You have a right to remain silent if your answers may tend to incriminate you.

b. Anything you say may be used as evidence both in an administrative proceeding or any future criminal proceeding involving you.

c. If you refuse to answer the questions posed to you on the ground that the answers may tend to incriminate you, you cannot be discharged solely for remaining silent. However, your silence can be considered in an administrative proceeding for its evidentiary value that is warranted by the facts surrounding your case.

3. No employee with foreseeable criminal exposure should be interviewed and required to answer questions; i.e., given "use" immunity without prior Department of Justice approval. If approved, then the following warnings should be given to the employee before the interview:

a. You are going to be asked a number of specific questions concerning the performance of your official duties.

b. You have a duty to reply to these questions, and agency disciplinary proceedings resulting in your discharge may be initiated as a result of your answers. However, neither your answers nor any information or evidence which is gained by reason of such statements can be used against you in any criminal proceeding.

c. You are subject to dismissal if you refuse to answer or fail to respond truthfully and fully to any question.

4. No informal agreements or understandings should be entered without prior approval of the Department of Justice.

III. VOLUNTARINESS OF CONFESSIONS

A. Prerequisite for Admissibility

The issue is not whether the confession is truthful, but whether it was voluntary; i.e., whether the defendant's will was overborne. Would an innocent person have confessed because of the police conduct? Rogers v. Richmond; Schneckloth v. Bustamonte.

If a confession is the product of an essentially free and unconstrained choice by its maker, the person has willed to confess, and it may be used against that person. If the suspect's will has been overborne and the capacity for self-determination critically impaired by actions of law enforcement personnel or persons acting for them, the use of this confession offends due process. Culombe v. Connecticut.

In determining if the defendant's will was overborne, courts have assessed the totality of all the surrounding circumstances--both the characteristics of the accused and the details of the interrogation.

Factors used in determining the voluntariness of statements have included: age, education, intelligence, length of detention, repeated or prolonged questioning, physical punishment, mental duress, knowledge of right to refuse, experience with law enforcement.

Although the court will decide the voluntariness of a statement for admissibility, the jury also has a right to assess voluntariness. If the trial judge determines that the defendant voluntarily made the statement it shall be

admitted and the judge permits the jury to hear relevant evidence on the issue of voluntariness instructing the jury to give such weight to the statement as the jury feels it deserves under the circumstances. 18 U.S.C. § 3501. We must do a thorough job of documenting the circumstances surrounding the taking of all statements.

B. Conduct That May Invalidate a Statement

Mental duress, as well as physical force or threats, may overcome the unwillingness to confess. Offering someone a "reward" of something to which they are already entitled (e.g., sleep, use of the bathroom, food, pain medications) may invalidate a confession just as much as the threat to withhold those rights until the person talks. This is a question of law for the trial judge.

C. Conduct That Should Not Invalidate a Statement

Some forms of deception may not invalidate a confession. Courts have said you may tell a suspect certain lies to get a confession. For example, "We found your fingerprints" is not the type of lie that would cause an innocent person to confess. An admonition to tell the truth is permissible, as is the usual statement that the officers will bring the person's cooperation to the attention of the prosecutor and the judge.

IV. HOW THE COURTS ENSURE THE "PRIVILEGE" IS PROTECTED

A. Introduction

Two years before the landmark Miranda decision, the United States Supreme Court decided the case of Escobedo v. Illinois. Law enforcement officers took Escobedo into custody and interrogated him at the police station. The officers did not tell Escobedo of his right to remain silent or his right to have an attorney present with him.

They confronted Escobedo with an alleged accomplice who accused Escobedo of committing a murder. When Escobedo denied the accusation

and said “I didn't shoot Manuel, you did it,” the officers handcuffed and took him to an interrogation room. After standing for four hours while being questioned, he confessed. His request for his attorney had been denied, while his attorney had been denied access to him at the station.

The Court held that Escobedo's statements were inadmissible. This set the stage for the Court to impose a requirement that police advise suspects of their Fifth Amendment right so that any statement resulting from custodial interrogation will be voluntary. The Court did this two years later in Miranda v. Arizona.

On March 13, 1963, Ernesto Miranda was arrested at his home and transported to a Phoenix police station. After being identified by the complainant, he was taken to an interrogation room and questioned by two officers. Two hours later Miranda confessed in a written statement, without being advised of his right to have an attorney present. At the top of the statement was a typed paragraph saying the confession was made voluntarily, without threats or promises of immunity and “with full knowledge of my legal rights, understanding any statement I make may be used against me.”

The trial judge admitted Miranda’s confession over the defense’s objection. The officers admitted that they did not advise Miranda that he had a right to have an attorney present. The court sentenced him to 20 to 30 years for rape and kidnaping. The Supreme Court of Arizona affirmed the conviction.

The United States Supreme Court reversed, holding that the lack of sufficient warnings as to his right against self-incrimination and the right to an attorney required the statements to be inadmissible:

> *...it is clear that Miranda was not in any way apprised of his right to consult with an attorney and to have one present during the interrogation, nor was his right not to be compelled to incriminate himself effectively protected in any other manner. Without these warnings the statements were inadmissible. The mere fact that he signed a statement which contained a typed-in clause stating he had 'full*

knowledge' of his 'legal rights' does not approach constitutional rights.

The Court's holding thus established what we now call the Miranda warning:

To summarize, we hold that when an individual is taken into custody or otherwise deprived of his freedom by the authorities in any significant way and is subjected to questioning, the privilege against self-incrimination is jeopardized. Procedural safeguards must be employed to protect the privilege and unless other fully effective means are adopted to notify the person of his right to silence and to assure that the exercise of the right will be scrupulously honored, the following measures are required:

He must be warned prior to any questioning that he has the right to remain silent, that anything he says can be used against him in a court of law, that he has the right to the presence of an attorney, and that if he cannot afford an attorney one will be appointed for him prior to any questioning if he so desires.

B. When the Warning Is Required

1. Custody

IPO 2 - Recognize when a Miranda warning must be given.

Miranda warnings are required for those in custody (it does not matter why, or for what or whose custody) who are questioned about their guilt. Mathis v. United States (state prison inmate being questioned by an IRS revenue agent about his federal income taxes). Warnings are not required if the interview concerns the activities of others.

2. Deprived of Freedom of Action in Any Significant Manner

In Orozco v. Texas the United States Supreme Court said that in determining when a person is deprived of their freedom of action in a significant way, the issue is whether a reasonable person would conclude that they were free to leave or whether the officer's conduct indicated that they were not free to leave. There four officers went to Orozco's apartment at four a.m. to question him. They entered his apartment, surrounded his bed where he was sleeping, awoke him and began to ask questions. The incriminating statements should not have been admissible under those circumstances since the officers gave no warnings and a reasonable person would conclude he was not free to ignore the officers.

Although United States v. Griffin is not a Supreme Court decision, it is the best case found that clearly sets forth factors to be considered in determining whether a person is deprived of their freedom of action so that Miranda warnings are required. FBI agents investigating an armed bank robbery developed reason to believe Griffin was one of the two robbers. The agents went to Griffin's house where his parents invited the agents inside to await the arrival of Griffin. The agents met Griffin as he entered the house and informed him they needed to speak to him concerning a bank robbery. Griffin responded by saying, "The gun wasn't loaded." At the request of the agents, the parents left Griffin alone with them. The agents, without giving Miranda warnings, interrogated Griffin for two hours. They did not tell Griffin he was not under arrest nor did they tell him that he was free to tell them to leave nor that he did not have to speak with them. During this time one agent accompanied Griffin wherever he went in the house and told him to stay in view at all times. The agents did this for their safety because a weapon had been used in the robbery but they did not explain this to Griffin. During the interview of two hours Griffin appeared nervous and fearful of the agents. At his trial, the court denied his motion to suppress the statements.

In reversing the conviction, the Eighth Circuit Court of Appeals said that custody occurred either upon formal arrest or under any other circumstances where the officers have deprived the person of their freedom of action in any

significant way. The determination of custody arises from an examination of the totality of circumstances, including examining such factors as the physical or psychological restraints placed on the person during interrogation, the freedom of the individual to leave the scene, and the purpose, place and location of the interrogation. What would a reasonable person in the suspect's position have believed their situation to be?

The court said that an analysis of cases indicated that there are several common indicia of custody:

a. whether the officers informed the suspect at the time of questioning that–

   (1) the questioning was voluntary;
   (2) the suspect was free to leave or request the officers to do so;
   (3) the suspect was not under arrest;

b. whether the suspect possessed unrestrained freedom of movement during questioning;

c. whether the suspect initiated contact with authorities or voluntarily acquiesced to official requests to respond to questions;

d. whether strong arm tactics or deceptive stratagems were employed during questioning;

e. whether the atmosphere of the questioning was police dominated;

f. whether the suspect was arrested at the termination of the questioning.

The first three factors would mitigate against finding custody, while the latter three would tend to be coercive factors leaning toward a finding of custody.

The cases have identified the absence of police advisement that the suspect is not under formal arrest, or that the suspect is at liberty to decline to answer questions, as important indicators of the existence of a custodial setting.

When the confrontation between the suspect and the legal system is instigated at the direction of law enforcement authorities, rather than the suspect, custody is more likely to exist.

An interrogation that occurs in an atmosphere dominated by the police is more likely to be viewed as custodial than one that does not. Place and length of the interrogation, whether the police assume control of the interrogation site and dictate the course of conduct followed by the person or other persons present at the scene (e.g., separating the person from relatives or family, or vice versa) or use of other domineering practices are factors in determining whether the atmosphere was police dominated.

The pattern of conduct in this case would lead a reasonable person to believe he was in custody. That being true, he was entitled to receive the Miranda warnings. Having not received them, Griffin's incriminating statements, other than the initial volunteered statement that the gun was not loaded, must be suppressed.

3. Interrogation

There also must be interrogation by government officials or those acting for the government before the Miranda warning is required. A person in custody may make statements that are admissible if the statements do not result from questioning by law enforcement personnel or persons acting for them. The term “interrogation” refers not only to express questioning but also to any words or actions designed to elicit an incriminating response. Rhode Island v. Innis.

The protections of the Miranda decision can be achieved if they extend to express questioning and its “functional equivalent.” The phrase “functional equivalent” includes any words or actions by the police (other than those normally attendant to arrest and custody) that the police should know are

reasonably likely to elicit an incriminating response from the suspect. Arizona v. Mauro.

In deciding whether particular police conduct is interrogation, the Court will focus on the purposes of the Miranda and Edwards decisions. It will prevent government officials from using the coercive nature of confinement to extract confessions that the suspect would not have given in an unrestricted environment.

4. By a Person Known to be a Law Enforcement Officer

In Illinois v. Perkins the United States Supreme Court clarified the Miranda decision. Recall that the earlier Court had required the warnings, when a law enforcement officer questions a person in custody, to ensure that any statement obtained in the police dominated atmosphere is a voluntary statement. Are the warnings required when a law enforcement officer questions a person in custody but the prisoner does not know the interrogator is a law enforcement officer? The Supreme Court said warnings were not required in such a situation; there is no coercive atmosphere. It is simply a situation of misplaced trust.

> *It is the premise of Miranda that the danger of coercion results from the interaction of custody and official interrogation. Custodial interrogation means questioning initiated by law enforcement officers after a person has been taken into custody. The warning mandated by Miranda was meant to preserve the privilege during incommunicado interrogation of individuals in a police dominated atmosphere. That atmosphere is said to generate inherently compelling pressures to speak.*
>
> *Conversations between suspects and undercover agents do not implicate the concerns underlying Miranda. The essential ingredients, of a police dominated atmosphere and compulsion, are not present when an incarcerated person*

speaks freely to someone that he believes to be a fellow inmate.

Coercion is determined from the perspective of the suspect. The inherent coerciveness of custodial interrogation situations is simply not present when the target is unaware that he is talking with the authorities.

Miranda forbids coercion, not mere strategic deception by taking advantage of a suspect's misplaced trust. Ploys to mislead a suspect or lull him into a false sense of security that do not rise to the level of compulsion or coercion to speak are not within the concerns of Miranda.

Detention, whether or not for the crime in question, does not warrant a presumption that the use of an undercover agent to speak with an incarcerated suspect makes any confession thus obtained involuntary.

The Court did not consider whether this result would apply if the prisoner had been given and invoked the right to counsel before the undercover officer questioned him. The rule, that an undercover agent may not be used to skirt the Sixth Amendment right to counsel after a suspect has been formally charged, was not violated since the government had not charged Perkins with the crime about which he was questioned.

5. Misdemeanors

Officers must give the warnings whether the questioning is about a misdemeanor or felony offense. Berkemer v. McCarty.

C. Giving the Miranda Warning

1. No warnings or defective warnings

If a law enforcement fails to properly give the Miranda warnings and receive a voluntary waiver, a resulting statement is inadmissible. But is a subsequent statement, given after a proper administration of the warnings, admissible? The defendant will contend that they would not have made the second statement "but for" the first and since the first is inadmissible, the court should exclude the second also. The Supreme Court has rejected such an argument in Oregon v. Elstad. It said the self-incrimination clause of the Fifth Amendment does not require the suppression of a confession, made after proper Miranda warnings and a valid waiver of rights, solely because the police had obtained an earlier voluntary but unwarned admission from the defendant.

A search or seizure violating a person's Fourth Amendment rights results in an exclusion of any evidence obtained and also "taints" any "fruits" found because of the illegal search or seizure.

A compelled or coerced statement violates a person's Fifth Amendment rights and is excluded from the case-in-chief. Yet there are fundamental differences between the role of the Fourth Amendment exclusionary rule and the function of Miranda in guarding against the prosecutorial use of compelled statements as prohibited by the Fifth Amendment.

Miranda warnings are not a constitutional right but are only a procedure designed to protect the rights guaranteed by the Fifth Amendment.

A confession obtained through custodial interrogation after an illegal arrest must generally be excluded. It is a Fourth Amendment violation; i.e., a fruit of the illegal arrest.

Still, Miranda sweeps more broadly than the Fifth Amendment and may result in exclusion of a statement that does not violate a Fifth Amendment right. The Fifth Amendment prohibits use by the prosecution in its case-in-chief

only of compelled testimony. Failure to administer Miranda warnings creates a presumption of compulsion. Therefore, courts must exclude unwarned statements that are otherwise voluntary.

The conclusion to be drawn is that failure to give Miranda warnings is not itself a violation of the Fifth Amendment. Consequently, if there is no coercion in obtaining the first statement, the procedure can be corrected and a subsequent voluntary confession will be admissible. Once warned, suspects are free to exercise their own volition in deciding whether to speak. Proper administration of Miranda cures the condition that created the presumption of coercion.

Recently the United States Supreme Court agreed to review a lower court's decision that held compliance with Miranda was not required to admit statements otherwise deemed voluntary by a trial judge according to 18 U.S.C. § 3501. Dickerson v. United States. Pending resolution of this issue all investigators should strictly comply with Miranda's mandate.

2. Confession after an illegal seizure

Where law enforcement officers have probable cause to arrest a person but no arrest warrant, the Fourth Amendment's exclusionary rule will bar the use of a confession made by a defendant after being illegally seized in the defendant's home. Nevertheless, a confession given outside the home, after proper warning and waiver is admissible. New York v. Harris.

In the Harris case the police developed probable cause that Harris had committed a felony offense. They entered his home and arrested him without having obtained an arrest warrant. The officers gave him and waived his Miranda rights. The Court said that the statement given in his home was inadmissible since the police were not lawfully present. It was a "fruit" of the violation of his Fourth Amendment rights. "Physical entry of the home is the chief evil against which the wording of the Fourth Amendment is directed."

However, when the officers took Harris to the police station, they again informed him of and waived his rights. The Court held that this statement was admissible. Harris was in lawful custody once he was outside his home since the police had probable cause. The admissibility of the second statement is to be judged only on the officers' compliance with the Fifth Amendment that has no "fruits of the poisonous tree" doctrine. The Court refused to adopt a rule that would make inadmissible any evidence, whether tangible or live-witness testimony, which somehow became known through a chain of causation that began with an illegal arrest.

3. The form of the warning

In Duckworth v. Eagan the United States Supreme Court dealt with the question of whether officers must give the Miranda warnings using the specific wording set forth in that case. Eagan was a suspect in a crime. While being questioned at the police station, he read and signed a form containing all the required Miranda warnings that also said, "You have this right to the advice and presence of a lawyer even if you cannot afford to hire one. We have no way of giving you a lawyer, but one will be appointed for you, if you wish, if and when you go to court." Eagan subsequently contended that those additional words rendered the warning invalid.

The Court held that such language does satisfy Miranda. The Miranda decision required that certain warnings be given as a prerequisite to the admissibility of a custodial statement. But the Court has never held that officers must give the warnings in the form set forth in the case.

Miranda does not require that attorneys be producible on call; only that police inform suspects that the suspect has the right to an attorney before and during questioning, and that the court would appoint an attorney for the suspect if the suspect cannot afford one. If law enforcement officers cannot provide appointed counsel, Miranda requires only that they not question a suspect unless the suspect waives the right to counsel.

D. When the Warning Is Not Required

Consistent with the purposes served by the Miranda ruling, no warnings are required if the suspect is not in custody. If the officers do not question the suspect (even a suspect in custody), no warnings are required. Officers must only provide the warnings if the suspect is in custody and is being questioned by a known law enforcement officer.

The Supreme Court has held that although a person may be temporarily detained, they may be in a situation in which they would not feel coerced. It is not a police dominated atmosphere. An example is a routine traffic stop. Consequently, warnings are not required. However, some circuit courts have held that warnings are required if force or weapons are used.

Asking personal history and questions necessary for processing the person is routine in "booking" a suspect. The purpose of these questions is for identification. They are permissible without giving Miranda warnings and the answers are admissible even if they are incriminating. This is true also even if the suspect has invoked the rights under Miranda.

Miranda warnings are not required when officer safety (e.g., during execution of a search warrant, asking about guns) and public safety (e.g., asking a person arrested in a public store where he threw the gun used in the commission of the crime) are an issue. New York v. Quarles.

Just because a person is the focus of the questioning does not require the law enforcement officer to give Miranda warnings. An officer's undisclosed intention to arrest at the conclusion of questioning does not create a custodial interrogation requiring the giving of Miranda warnings. Stansbury v. California.

V. WAIVER OF MIRANDA RIGHTS

IPO 3 - Identify the criteria to be met before a waiver of Miranda rights will be valid.

A. Requirements for a Waiver

Any decision to waive Miranda rights must be made voluntarily. The decision must be an exercise of the free will rather than a result of conduct by a law enforcement officer that overbears the defendant's will to make a choice. "Coercive police activity is a necessary predicate to the finding that a confession is not voluntary." Colorado v. Connelly.

A decision to waive constitutional rights must be knowingly and intelligently made; that is, the person comprehends what is being done (e.g., not overly affected by alcohol, drugs, mental impairment, deafness or language barrier). When the Supreme Court says that a decision to waive rights must be intelligently made, it is not saying that the decision must be a clever one. Rather, the person must have an understanding of what the rights are and the consequences of waiving those rights. "A valid waiver does not require that an individual be informed of all information useful in making his decision or all information that might affect his decision to confess. Additional information would only affect the wisdom of a Miranda waiver, not its essentially voluntary and knowing nature." Colorado v. Spring.

A person can partially invoke Miranda rights (e.g., unwilling to give a written statement) and partially waive those rights (e.g., willing to give an oral statement). "A defendant's decision need not be logical. It only needs to be voluntary. The Court has never embraced the theory that a defendant's ignorance of the full consequences of his decision nullifies its voluntariness." Connecticut v. Barrett.

Remember that a defendant can introduce evidence surrounding the taking of a statement to convince a jury that a confession is involuntary despite the judge having ruled that it is legally admissible. Interrogators must carefully document the circumstances involved in taking a statement.

B. Form of the Waiver

The Supreme Court has never required any specific form of a waiver. It may be oral or written. No particular words are required. However, "a valid waiver will not be presumed simply from the silence of the accused after warnings are given or simply from the fact that a confession was in fact eventually obtained." North Carolina v. Butler. There must be both an affirmative acknowledgment that the person understands the rights and a statement that the person is willing to waive the rights and make a statement.

VI. INVOKING MIRANDA RIGHTS

A. Right to Silence

Once a person in custody has invoked the right to remain silent, further police initiated interrogation must cease. Michigan v. Mosley. An officer may ask routine booking, processing, or personal history questions even if the answers may be incriminating.

Officers may reinitiate the conversation at a later point or the defendant may reinitiate contact. This will then allow questioning if the defendant waives Miranda rights. Law enforcement officers may subsequently reinitiate contact with a person in custody to ask whether the person has changed their mind about remaining silent. There should be some change in circumstances before the contact is made, such as changed location, passage of a reasonable amount of time or a request to question the prisoner about a different crime. Any questioning must be preceded by Miranda warnings and a waiver obtained.

B. Right to Counsel

IPO 4 - Identify limitations imposed on law enforcement officers when a person exercises Miranda rights.

Once a person in custody invokes the right to counsel, further police initiated interrogation must not occur while the person remains in custody. By asking for the

assistance of counsel, the person is saying that they do not want to deal with law enforcement personnel without a lawyer. An exception to this rule occurs if an officer asks routine booking, processing or personal history questions even though the answers may be incriminating.

The defendant may reinitiate contact with law enforcement officers and that will allow them to question the person if they first obtain a waiver of the Miranda rights. However, the mere fact that a person in custody answers questions after invoking the right to counsel is not sufficient to establish a waiver.

Edwards v. Arizona is a significant case that both clarifies the ruling in Miranda and places restrictions on the conduct of law enforcement officers. The Court said:

> *...and we now hold that when an accused has invoked his right to have counsel present during custodial interrogation, a valid waiver of that right cannot be established by showing only that he responded to further police-initiated custodial interrogation even if he has been advised of his rights. We further hold that an accused such as Edwards, having expressed his desire to deal with the police only through counsel is not subject to further interrogation by the authorities until counsel has been made available to him, unless the accused himself initiates further communication, exchanges or conversations with the police.*

In Oregon v. Bradshaw the Supreme Court established a two-step analysis of situations in which a defendant has cut off questioning by invoking the right to consult with an attorney. After an officer arrested and advised Bradshaw of his Miranda rights, he denied his involvement and asked for an attorney. The officer immediately stopped the conversation. Sometime later, while being transferred from the police station to jail, Bradshaw asked the police officer, "Well, what is going to happen to me now?" The officer answered by saying, "You do not have to talk to me. You have requested an attorney and I don't want you talking to me unless you do desire because anything you say--

because--since you have requested an attorney, you know, it has to be your own free will." Bradshaw said he understood.

There followed a discussion between Bradshaw and the officer concerning where the officer was taking Bradshaw and the offense with which he would be charged. The officer suggested that Bradshaw might help himself by taking a polygraph examination. Bradshaw agreed to this and the next day, after another reading of his Miranda rights and signing a written waiver of these rights, the polygraph was administered. When the examiner told Bradshaw that he did not believe he was telling the truth, Bradshaw recanted his earlier story and made several damaging admissions.

Eight justices agreed that the second interrogation of a suspect is improper unless the government can show, first, that the accused initiated further conversation, and second, that the suspect then validly waived the previously asserted right to counsel.

In applying the two step analysis, the Court held that:

1. In asking, "Well, what is going to happen to me now?" Bradshaw "initiated" further conversation; it "evinced a willingness and a desire for a generalized discussion about the investigation; it was not merely a necessary question arising out of the incidents of the custodial relationship." and

2. Since there was no violation of the Edwards rule here, the next inquiry is whether, considering the totality of the circumstances, Bradshaw made a knowing and intelligent waiver of his right to have counsel present. Since the trial court, based upon its first-hand observation of the witnesses, found a valid waiver, there is no reason to dispute that finding.

Four justices appeared to agree with the two step analysis but disagreed with the result. They felt that the Bradshaw's statement did not open a "dialogue

about the subject matter of the criminal investigation" and therefore failed the Edwards rule requirement that Bradshaw "initiate further conversation."

Invocation of the right to counsel and the waiver of it are two distinct questions. Following an accused's request for counsel, responses to further interrogation cannot be used to cast doubt on the request for counsel. Smith v. Illinois.

Invocation of the request for counsel must be clear and unambiguous. The United States Supreme Court has held that if the request is ambiguous, equivocal or not clear, the officer is not required to stop the interrogation. Davis v. United States.

C. Opportunity to Consult with Counsel

Remember that in Arizona v. Edwards the United States Supreme Court ruled that once a person in custody requests counsel, no further police initiated interrogation may occur until the officers have made counsel available to him. After a defendant has consulted with counsel, may we approach the person in the absence of counsel, obtain a Miranda waiver and receive an admissible confession? The Supreme Court, in Minnick v. Mississippi said we cannot.

When the defendant has requested counsel, interrogation must cease and officials may not reinitiate interrogation without counsel present, whether or not the accused has consulted previously with an attorney.

The requirement that counsel be made available to a person requesting counsel means more than the opportunity to consult with counsel outside the interrogation room. The rule bars police initiated questioning unless the accused has counsel present at the time of questioning. The rule ensures that any statement made in subsequent interrogation is not the result of coercive pressure.

D. Questioning about Other Crimes

If a person in custody invokes the right to counsel, may a different law enforcement officer, investigating a different crime, approach the person, obtain a Miranda waiver, and get an admissible statement about the second crime?

Arizona v. Roberson held that such conduct would violate the person's right to counsel. The Supreme Court designed the Edwards decision to provide a bright-line rule for law enforcement officers that bars further law enforcement officer initiated custodial interrogation of a suspect who has requested counsel. It does not matter whether it is the same or a different law enforcement officer, nor whether the questions are about the same offense for which the officer arrested the defendant or about a different offense.

A subsequent law enforcement officer initiated interrogation will result only in an invalid waiver. Such interrogation may occur only in the presence of counsel or if initiated by the defendant.

The Edwards rule focuses on the state of mind of the suspect and not of the police. Unless the suspect otherwise states, there is no reason to assume that a suspect's state of mind is in any way investigation-specific.

VII. STATEMENTS OBTAINED IN VIOLATION OF MIRANDA -- USED FOR IMPEACHMENT

A. Voluntary Statements -- Used Against Defendant

The Supreme Court decades ago approved the use of voluntary statements, obtained in violation of Miranda, to impeach a defendant who had taken the witness stand and testified inconsistently with earlier inadmissible statements. The court viewed Miranda as a shield to protect the rights of the accused and not a license to commit perjury. Harris v. New York

B. Statements Used Against Defense Witnesses

A statement obtained in violation of a defendant's Fourth Amendment rights is barred by the Exclusionary Rule from being used as evidence to convict the person whose rights officers have violated. However, there are exceptions to the Exclusionary Rule. One exception permits prosecutors to introduce illegally obtained evidence for the limited purpose of impeaching the credibility of a defendant's own testimony; it penalizes a defendant for committing perjury by allowing the prosecution to expose it. The balance of values underlying the Exclusionary Rule justifies an exception covering impeachment of the defendant's testimony.

Expanding the class of impeachable witnesses from the defendant alone to all defense witnesses would create different incentives affecting the behavior of both defendants and police. Expansion would not promote the truth seeking function and would undermine the deterrent effect of the Exclusionary Rule. Consequently the Supreme Court has refused to expand the exception to allow the use of such statements against any defense witnesses when the government obtained the statement in violation of the defendant's Fourth Amendment rights. James v. Illinois.

C. Due Process Violation

A violation of the self-incrimination clause does not occur until the government offers the statement into evidence at a criminal trial. However, officers may violate other aspects of the suspect's Fifth Amendment rights that can lead to liability. The officer who ignores a suspect's invocation of Miranda rights and tries to get a statement from that person violates the person's constitutional right to due process. Such conduct might lead to personal liability under the Bivens doctrine. Cooper v. Doupnik.

VIII. THE SIXTH AMENDMENT

A. Introduction

IPO 5 - Identify the limitations imposed on law enforcement officers when a person exercises their Sixth Amendment right to counsel.

The Fifth Amendment's (self-incrimination clause) guarantee of the right to counsel provides the right to have an attorney present during custodial interrogation by persons known to be law enforcement officers. The right to counsel, while not found in the Fifth Amendment, has been established by the Supreme Court's interpretation of that amendment. This right comes into existence only when the defendant invokes it in response to being given Miranda warnings.

The Sixth Amendment, like the Fifth, has several clauses. One of these guarantees the right to counsel in specific situations.

> *In all criminal prosecutions, the accused shall have the right to . . . have the assistance of counsel for his defense.*

This right comes into existence with the initiation of formal adversary judicial proceedings. At this point, the government must make counsel available to the defendant, upon request, to represent the defendant at all subsequent critical stages of the proceeding. Kirby v. Illinois; Moore v. Illinois. The defendant may waive this right.

Adversarial judicial proceedings may be triggered by:

1. a preliminary examination (hearing).
2. an indictment.
3. an information.

4. an arraignment.

The Supreme Court has held that the critical stages were:

1. a lineup.

2. questioning by law enforcement officers.

3. court appearances.

Since an initial appearance is not an adversarial proceeding, the Sixth Amendment right to counsel does not automatically attach just because a defendant makes an appearance before a magistrate judge. However, at the initial appearance the court will ask defendants if they have, or want, counsel. If they say they do, then the right attaches then.

B. Effect of the Sixth Amendment on Law Enforcement Officers

Once the Sixth Amendment right to counsel attaches and is invoked, law enforcement officers are barred from initiating interrogation, about the crime with which the defendant has been charged, without counsel.

C. What Is Questioning?

1. For Fifth Amendment purposes:

In Rhode Island v. Innis, the Supreme Court said that the right to counsel during questioning arises when custodial interrogation takes the form of either:

a. express questioning, or

b. words or actions by the police (other than those normally attendant to arrest and custody) that the police should know are reasonably likely to elicit incriminating responses from the suspect.

2. For Sixth Amendment purposes:

The right to counsel during questioning under the Sixth Amendment depends not on whether there is custody but on whether formal adversarial proceedings have begun:

a. express questioning, or

b. The functional equivalent of questioning; i.e., "conduct designed to elicit a response." Brewer v. Williams.

D. Questioning by a Person Acting on Behalf of Law Enforcement Officers

1. Co-defendant

If the government has indicted a defendant and the defendant has invoked the right to counsel, incriminating statements made to a co-defendant acting for law enforcement officers, may not be admitted at trial against the defendant. Massiah v. United States.

2. Informant

In United States v. Henry, the Supreme Court relied on Massiah to hold that the government violated Henry's Sixth Amendment right to counsel when it instructed a paid informant and cell mate of Henry's to "engage him in conversations" and see if he could get incriminating statements. By intentionally creating a situation likely to induce the defendant to make incriminating statements without the assistance of counsel, the government violated the defendant's Sixth Amendment right to counsel.

Placing an informant in a jail cell with a defendant is permissible if the informant is instructed not to ask any questions, but to just "keep your ears open" for information from the defendant.

Simply showing that the defendant made an incriminating statement to the police informant does not establish a Sixth Amendment violation. "The defendant must demonstrate that the police and their informant took some action, beyond merely listening, that was designed deliberately to elicit incriminating remarks." Kuhlman v. Wilson.

IX. THE SIXTH AMENDMENT RIGHT TO COUNSEL

A. Right to Counsel Has Attached and Counsel Has Been Requested

In Michigan v. Jackson the United States Supreme Court held that once an accused has made a request for counsel under the Sixth Amendment, questioning of the accused by law enforcement officers must not be initiated. No discussion with the accused may be conducted without the accused's attorney (unless the accused initiates the conversation and waives the right to counsel). Further, if law enforcement officers contact a defendant in such circumstances and obtain a waiver of Miranda rights, it will not be a valid waiver since counsel is not present.

The Sixth Amendment right to counsel requires at least as much protection as the Fifth Amendment right to counsel. Once the defendant asserts the right to counsel, the court will impute knowledge of that to law enforcement officers; that is, they need not be personally present in court to learn of the request; they will be presumed to know.

The presumption is against finding a waiver of a fundamental constitutional right. Just as written waivers are insufficient to justify law enforcement officer initiated interrogation after the request for counsel in a Fifth Amendment analysis, so too they are insufficient to justify law enforcement officer initiated interrogations after the request for counsel in a Sixth Amendment analysis.

B. Right to Counsel Has Attached but Counsel Has Not Been Requested

The fact that a person has been indicted, where there is no request for counsel made, and where there has been no arraignment or similar proceeding, does not preclude police-initiated interrogation. The law enforcement officer simply needs to obtain a waiver of the right to counsel. Since a waiver of Miranda rights is sufficient to waive the right to counsel under the Fifth Amendment, it is sufficient also to waive the right to counsel under the Sixth Amendment.

The Sixth Amendment guarantees a defendant the right to the assistance of counsel at a post-indictment interrogation with law enforcement officers. Still, a defendant must exercise that right by asking for counsel. Once the defendant expresses that desire then law enforcement officer initiated interrogation must cease until counsel is present, according to Edwards.

A waiver of the Sixth Amendment right to counsel is valid only when it reflects an intentional relinquishment or abandonment of a known right or privilege. Miranda warnings are sufficient to advise a defendant of those rights and the consequences of a waiver--in most cases. Situations that would suffice for a Fifth but not a Sixth Amendment waiver could include: not telling a defendant that his lawyer was trying to reach him during questioning; an undercover law enforcement officer or informant questioning an indicted person.

> *The key inquiry in a case such as this one must be: was the accused who waived his Sixth Amendment rights during post-indictment questioning, made sufficiently aware of his right to have counsel present during the questioning, and of the possible consequences of a decision to forgo the aid of counsel. An accused who is admonished with the warnings prescribed by Miranda has been sufficiently apprised of the nature of his Sixth Amendment rights and of the consequences of abandoning those rights, so that his waiver on this basis will be considered a knowing and intelligent*

one. Miranda warnings are sufficient for this purpose. Patterson v. Illinois.

The Court did not address the question of whether the officers must tell the accused that an indictment exists before a post-indictment Sixth Amendment waiver will be valid. However, some district and circuit court decisions since Patterson suggest that it may not be necessary.

C. Statement Obtained in Violation of Sixth Amendment: Used for Impeachment

Michigan v. Jackson established a protective rule that once a defendant invokes the Sixth Amendment right to counsel, a subsequent waiver of that right, even if voluntary, knowing and intelligent under traditional standards, is presumed invalid if secured pursuant to police initiated conversation. "There is no reason for a different rule in a Sixth Amendment rather than the Fifth Amendment case involving the privilege against self-incrimination or the right to counsel."

Jackson is to the Sixth Amendment right to counsel what Miranda/Edwards is to the Fifth Amendment right to counsel. Since statements obtained in violation of the Fifth Amendment right to counsel may be used for impeachment purposes, the Supreme Court held that the same rule should apply to statements obtained in violation of the Sixth Amendment right to counsel; that is, such statements may be used for impeachment of the defendant. Michigan v. Harvey.

D. Post Indictment Statements about Uncharged Offenses

A law enforcement officer may initiate contact with an incarcerated person whom the government has indicted and requested counsel under the Sixth Amendment, if the questioning, after a waiver of Miranda rights under the Fifth Amendment, relates to a crime with which the defendant has not been charged. McNeil v. Wisconsin.

Invocation of the Sixth Amendment right to counsel during a judicial proceeding does not constitute an invocation of the Miranda right to counsel under the Fifth Amendment.

In Michigan v. Jackson the Supreme Court said that once the right to counsel under the Sixth Amendment has attached and been invoked, any subsequent waiver during a police-initiated custodial interview is ineffective. The Sixth Amendment right, however, is offense specific. The defendant cannot invoke it once for all future prosecutions, for it does not attach until the government commences a prosecution; that is, at or after the initiation of adversary judicial criminal proceedings -- whether by way of formal charge, preliminary hearing, indictment, information, or arraignment. Incriminating statements about other crimes, which the Sixth Amendment has not yet attached, are admissible at a trial of those offenses.

The Miranda rule recognized that statements elicited during custodial interrogation would be admissible if the prosecution could establish that the suspect voluntarily, knowingly and intelligently waived the privilege against self-incrimination and the right to counsel. The Edwards/Roberson rule, is not offense specific. Once a suspect invokes the Fifth Amendment Miranda right to counsel for interrogation regarding one offense, the suspect may not be reapproached regarding any offense unless counsel is present.

The purpose of the Sixth Amendment counsel guarantee is to protect the unaided layman at critical confrontations with an expert adversary, the government, after the adverse positions of government and defendant have solidified with respect to a particular alleged crime. The purpose of the Miranda/Edwards guarantee is to protect a different interest: the suspect's desire to deal with police only through counsel. This is in one respect narrower than the interest protected by the Sixth Amendment guarantee (because it relates only to custodial interrogation) and in another respect broader (because it relates to interrogation regarding any suspected crime and attaches whether or not the adversarial relationship produced by a pending prosecution has yet arisen). To invoke the Sixth Amendment interest is not to invoke the Miranda/Edwards interest.

Edwards applies only when the suspect has expressed a wish for the particular sort of lawyerly assistance that is the subject of Miranda. It requires, at a minimum, some statement that the police can reasonably construe to be an expression of a desire for the assistance of an attorney in dealing with custodial interrogation.

Michigan v. Jackson held that after the Sixth Amendment right to counsel attaches and is invoked, any statements obtained from the accused during subsequent police-initiated custodial questioning regarding charges at issue (even if the defendant purports to waive the right to counsel) are inadmissible as substantive evidence at the defendant's trial. The relevant question is not whether the defendant has asserted the Miranda Fifth Amendment right, but whether the defendant has waived the Sixth Amendment right to counsel.

X. SUMMARY

A. The Fifth Amendment

1. A person has no constitutional right, under the self-incrimination clause of the Fifth Amendment, to be represented by counsel during questioning by law enforcement officers. That "right" has been established by the United States Supreme Court by its interpretation of the Fifth Amendment. This was announced in the Miranda decision.

2. A person has a constitutional right, under the self-incrimination clause of the Fifth Amendment, not to be compelled to provide testimonial evidence and then have that evidence used against them in a subsequent criminal trial.

3. The Fifth Amendment's self-incrimination clause does not require the Miranda warnings. The Miranda warnings are simply a procedure devised by the Supreme

Court as a means to protect the constitutional right against compelled self-incrimination.

4. Law enforcement officers, whether known to be law enforcement officers or not, are not required to give Miranda warnings to a person before questioning a person who is not in custody or otherwise deprived of their freedom of movement in any significant way.

5. A person is not required to answer questions of a law enforcement officer or employer if the answers could be used against the person in a criminal trial.

6. A person cannot be terminated from employment solely for exercising a constitutional right. Remaining silent can be considered in an administrative proceeding but cannot be used as the basis to terminate absent a grant of use immunity.

7. A person cannot claim the right against self-incrimination if there is no potential of having the answers used against the person in a subsequent criminal trial.

8. Law enforcement officers are required to give Miranda warnings and receive an affirmative, voluntary waiver of those rights before questioning a person who is in custody.

9. Miranda warnings are not required before questioning a person in custody by an informant.

10. A person who is in custody or deprived of their freedom of movement in any significant way may exercise the right to remain silent when given Miranda warnings or upon their own initiative. Upon asserting that right, all

interrogation by known law enforcement officers must cease. However, officers may subsequently reinitiate contact with the person to determine if the person has changed their mind about submitting to questioning. If the person has, the officers may question the person after providing the Miranda warnings and receiving a voluntary, knowing and intelligent waiver of those rights.

11. A person who is in custody or deprived of their freedom of movement in any significant way may exercise the right to counsel when given Miranda warnings or upon their own initiative. Upon asserting that right, all interrogation must cease. Officers may not thereafter reinitiate contact with the person to question them about any crime while the person remains in custody. This prohibition applies whether the defendant knows the questioner to be a law enforcement officer or not.

12. Law enforcement officers may reinitiate contact with a person in custody who has previously asserted their right to counsel only if the person's attorney is present during questioning.

13. A person in custody who has previously invoked the right to counsel may change their mind and initiate contact with law enforcement officers who may then question the person if the person is given Miranda warnings and waives those rights.

14. Statements made by a person in custody or deprived of their freedom of movement, after the person has asserted their right to silence and/or their right to counsel, are admissible if the statements are made voluntarily and are not the result of questioning.

15. The restrictions and prohibitions imposed on law enforcement officers also apply to informants or other persons acting for law enforcement officers.

16. The self-incrimination protection does not apply to the compelled production of nontestimonial evidence obtained for identification purposes.

B. The Sixth Amendment

1. A person whom the government has not formally charged with a crime has no Sixth Amendment constitutional right to be represented by counsel during questioning by law enforcement officers or employers.

2. A person has a Sixth Amendment constitutional right to be represented at all critical stages after the initiation of adversarial judicial proceedings.

3. The Sixth Amendment right to counsel, when applicable, applies whether the person is in custody or not.

4. A person who has the right to counsel, and has asserted the right, may not be approached by law enforcement officers to ask questions about the crime with which the person has been charged unless the person's counsel is present. Officers cannot, even by the administration of Miranda warnings, obtain a valid waiver of the right to counsel without the person's attorney.

5. A person who has the right to counsel, but who has not yet invoked the request for counsel, may be approached by law enforcement officers and questioned if the officers first administer Miranda warnings and receive a voluntary, affirmative waiver of the right to counsel.

6. The Miranda warnings provide sufficient notice of the Sixth Amendment right to counsel.

7. A person in custody, formally charged with a crime, who has invoked the Sixth Amendment right to counsel but who has not invoked the Fifth Amendment right to counsel, may be approached by law enforcement officers and questioned about a crime with which the person has not been charged if the officers receive a voluntary affirmative waiver of the Fifth Amendment Miranda rights.

8. A person in custody who has invoked both the Fifth and Sixth Amendments' right to counsel may not be approached for questioning about any crime by a law enforcement officer or other person acting for them.

9. Statements made by a person who has invoked the Sixth Amendment right to counsel will be admissible if the statements are made voluntarily and not as the result of questioning by law enforcement officers or persons acting for them.

10. The restrictions and prohibitions imposed on law enforcement officers also apply to informants or other persons acting for law enforcement officers.

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FEDERAL RULES OF EVIDENCE

DESCRIPTION:

This four-hour course examines the Federal Rules of Evidence regarding the introduction of character evidence; privileges; and hearsay.

TERMINAL PERFORMANCE OBJECTIVE:

Students will identify, from scenarios of factual situations: whether character evidence is admissible; application of a privilege; and the exclusion of evidence by the rule against hearsay.

INTERIM PERFORMANCE OBJECTIVES:

1. Identify when evidence of character traits or bad acts is admissible to prove the defendant committed the crime charged.

2. Identify when the four privileges recognized by the Federal Rules of Evidence may preclude a jury from receiving relevant evidence.

3. Identify statements that are hearsay and statements that are not hearsay.

4. Identify statements that are exceptions to the hearsay rule.

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FEDERAL RULES OF EVIDENCE

TABLE OF CONTENTS

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FEDERAL RULES OF EVIDENCE

I. INTRODUCTION

The Legal Division has designed this text to consider only a few parts of the Federal Rules of Evidence that have particular significance for Federal law enforcement agents and officers. These areas are character evidence, privileges and hearsay.

While the focus of the Continuing Legal Education Training Program is on new court decisions and laws, there is typically not much new in respect to the rules of evidence. However, since the culmination of an officer's investigation may be the presentation of evidence during a trial, becoming reacquainted with some of the rules may be helpful. This text includes case citations in the event the reader wishes to do additional research for further support for some legal proposition.

A. Applicability of the Federal Rules of Evidence

When Congress adopted the rules of evidence in 1975, it stated that their purpose was to "secure fairness in administration, elimination of unjustifiable expense and delay, and the promotion of growth and development of the law of evidence to the end that truth may be ascertained and proceedings justly determined."

The Federal Rules of Evidence govern proceedings in the Federal Courts of the United States and before United States Magistrate Judges. The Rules do not apply, however, to the issuance of search and arrest warrants, grand jury proceedings, initial appearances, bail hearings, preliminary examinations, suppression hearings, preliminary questions of admissibility, or sentencing. The rules apply at trials. It is important to note that the rule with respect to privileges applies to all stages of all proceedings, including those before trial.

B. Definition of Evidence

Evidence is the means by which any fact, the truth of which is submitted to a jury, is established or disproved. It is anything offered before a court for proving or disproving some disputed fact. Evidence is not *proof* but rather proof is the result or the effect of evidence.

II. RELEVANCY AND COMPETENCY

A. Admissibility of Evidence

To be admissible, evidence must be both *relevant* and *competent*. The terms relevant and competent are not synonymous. Sometimes evidence is admissible only for a limited purpose, such as for impeachment (attacking the character of a witness). Always, the party seeking the admission of evidence must provide a foundation for its admissibility. This includes showing that the evidence is relevant, the evidence is competent, and, for documentary evidence, it is authentic. The relevancy and competency of evidence are questions of law to be determined by the trial judge.

B. Relevancy

Evidence is relevant if it has any tendency to make the existence of a fact in question more or less probable. If a fact offered in evidence relates in some logical way to an issue in the case, it is relevant. The word itself implies a traceable and significant connection between facts involved in the case. A proposed piece of evidence does not have to bear directly on the principal fact. It is sufficient if the proposed evidence constitutes one link in a chain of evidence. One fact is relevant to a second fact if it tends to prove (or disprove) the existence of the second fact. The principal question to be resolved in determining relevancy is "would the evidence be helpful to the finder of fact (the jury) in resolving the issue?"

The fact that the evidence is weak does not make it irrelevant (e.g., an identification made by someone who has glaucoma and has had cataract surgery, United States v. Foster); (no such thing as "marginally relevant"

evidence, United States v. Gatto); (identification of the defendant by a witness who was under hypnosis at the time is permissible; the issue is credibility, not relevance, United States v. Searing; United States v. Bailey).

Examples of evidence that would be relevant to guilt include:

Evidence of a guilty mind:

- flight (defendant must know he is a suspect) United States v. Blakey; United States v. Pungitore; United States v.Felix-Gutierrez.
- false statements, e.g., alibi, identification, United States v. Rojo-Alvarez; United States v. Fozo; United States v. Perkins; United States v. Okayfor.
- inconsistent statements
- impeding a witness, United States v. Coiro; United States v. Maddox.
- offering a bribe, United States v. Paccione.
- refusal to give handwriting exemplars, United States v. Jackson.

Altering or Destroying Evidence: United States v. Briscoe.

Motive:

- financial (e.g., crime to gain needed money), United States v. Ewings; United States v. Campbell; (error to exclude evidence that an informant got a $314,000 reward for his work on

the defendant's case, United States v. Williams (2)).

- feelings (e.g., malice, revenge), United States v. Dunn.

Even though evidence may be relevant, the court may exclude it if the danger of unfair prejudice substantially outweighs its probative value, confusion of the issues, or is a waste of time, United States v. Noland; (evidence is prejudicial only when it is unfairly prejudicial, United States v. Russell). Evidence is *probative* if it tends to prove or disprove a fact in issue. The trial judge exercises broad discretion in this determination. Appellate courts generally will not reverse the decision of the trial judge unless a clear abuse of discretion exists.

Examples of evidence that may be excludable though relevant:

Danger of Unfair Prejudice:

- gruesome photos or details of the crime; Wilson v. City of Chicago; (in a drug conspiracy trial, it was error to admit photos of the charred bodies killed in the crash of a drug smuggling airplane, United States v. Eyster).

- fear of a violent defendant; (court improperly allowed arresting agents to testify they were heavily armed because of fear that a defendant was a sniper at the drug lab site, United States v. Sullivan).

- religious affiliation; (wrongful death suit of Jehovah's Witness victim; testimony that Jehovah's Witnesses refuse to salute the flag and do service for their country, Munn v. Algee).

- homosexuality; (error to admit videotape of defendant condoning homosexuality and comparing women to dogs, United States v. Ham).

- propensity for violence; United States v. Bradley.

- photo suggesting commission of uncharged crime; (in a drug prosecution it was error to admit a photo of a child lying among a very large amount of cash, United States v. Lloyd).

- evidence of uncharged crime; (error to admit evidence that a person died of drugs supplied by the defendant, United States v. Royal).

- evidence of events remote in time; (error to admit evidence that 20 years earlier the defendant had been accused of child molestation, Henry v. Estelle).

- witness stating his occupation; ("I am the defendant's probation officer," United States v. Pace).

- photo spread (including the defendant) when not used for identification of the defendant; (to do so implies the defendant has a prior criminal record, United States v. Hines).

Guilt by Association:

- a member of Hells Angels; United States v. Roark.

- defendant met profile of a gang member; United States v. Robinson.

- defendant met the profile of a drug courier; United States v. Simpson.

- co-defendants pled guilty; United States v. Blevins.

Nationality:

- law enforcement officer improperly allowed to testify to modus operandi of Jamaican drug dealers and how Jamaicans had taken over a drug market; United States v. Doe.

Confusion of the Issue:

- in prosecution for fraud in obtaining loans, judge refused to permit the defendant to introduce evidence of the government spying on him; United States v. Spencer.

Misleading the Jury:

- in charge of child pornography, the court should not have permitted the prosecution to introduce video tapes owned by the defendant that were legal to possess then; United States v. LaChapelle.

Undue Delay:

- to explain the source of his money the court permitted the defendant to testify about his gambling but not about details of his betting system; United States v. Saget.

Waste of Time or Needless Presentation of Cumulative Evidence:

- error to admit all of defendant's prior convictions to prove he is a convicted felon; Fernandez v. Leonard.

Hearsay

Violates the Best Evidence Rule

Privileged status: United States v. Morris.

Miscellaneous Reasons:

- in prosecution for mail and wire fraud, evidence about the defendants' bizarre gold refining methods should not have been admitted; United States v. Joetzki.

C. Competency

Evidence must not only be relevant, it must also be competent. Evidence obtained illegally, such as a coerced confession or an unlawful search, is said to be "incompetent" and thus inadmissible in a Federal criminal trial. Although relevant, evidence may be incompetent and, therefore, inadmissible.

Evidence must be both relevant and competent.

Competent evidence is that which is worthy of consideration by a court (and the jury). Certain forms of evidence, by their nature, are incompetent, such as forced confessions, testimony of very young witnesses, and lay opinions of expert matters. Competency should not be confused with credibility. The trial judge determines if proposed evidence (or testimony) is competent. If the judge admits the evidence into the courtroom, the jury must then decide how trustworthy, or credible, the evidence is. Evidence could be both relevant and competent but admitted only for a limited purpose, such as an expert testifying on the usual industry practices in contracting with Department of Defense, United States v. Leo.

D. Character Evidence

1. Character Traits

IPO 1 - Identify when evidence of character traits or bad acts is admissible to prove the defendant committed the crime charged.

Evidence of a person's character is not admissible to prove that the person acted in conformity with that trait on a particular occasion. The government cannot introduce such traits to prove the defendant is guilty of the crime charged. The saying "once a thief, always a thief" is not a basis for the admission of character evidence.

Defendants can, however, place a pertinent part of their character in issue by one of three methods: (1) by taking the stand and testifying that the acts alleged are inconsistent with their character, (2) by having witnesses testify that the acts alleged are inconsistent with the defendants' character, (3) or by attacking the character of a victim. In these instances, the trait must be pertinent to the crime charged. Thus, the character for peacefulness is pertinent in an assault case and the character for honesty is pertinent in an embezzlement case, but not vice-versa.

By putting their character in issue, defendants are said to have "opened the door." The government may then cross-examine the defendant and/or the defendant's witnesses on this trait. Testimony about bravery or attention to duty is not admissible since it is not pertinent to a character trait involved in the charge of mail fraud, United States v. Nazzaro. For example, a defendant charged with assault may present a character witness who testifies that the defendant is "peace loving." The prosecution can then ask this witness on cross-examination if he or she had heard that the defendant had hit another individual on another occasion (even if no conviction or arrest resulted in the other incident), United States v. Alvarez. In addition to cross-examining the defendant's character witnesses, the government may also put on *rebuttal* witnesses to testify that the defendant has a reputation for being aggressive.

If the defendant "opens the door," the government can rebut the character trait by cross-examining the defendant, asking:

- **U** questions about prior convictions involving that character trait; United States v. Adair.

- **U** questions about prior arrests involving that character trait; United States v. Collins.

- **U** questions about prior crimes or bad acts that involve that character trait, United States v. Finley; (reprimand for falsifying a time sheet, United States v. Manos).

The character of the victim is often placed in evidence by the defendant to support a claim of self defense. The government can then introduce rebuttal evidence showing the victim's good character but could not introduce evidence of the defendant's violent nature.

2. Other Bad Acts or Crimes

As with character traits, prior instances of conduct (acts) cannot be used to prove that the defendant acting in conformity with character in those prior acts. This type of evidence is sometimes called "similar transaction," "uncharged misconduct," or "prior bad acts" evidence. Evidence of prior conduct is not admissible to show that the defendant has a character trait that leads to certain types of activity.

On the other hand, the prosecution may introduce prior acts (and, unlike traits, without waiting for the defendant to open the door) to show something other than a propensity to commit the charged crime. The rule provides examples of purposes for which prior bad act evidence may be introduced:

- **±** Motive: court allowed evidence that a murder victim fired the defendant for filing a false travel voucher one month before the alleged shooting; United States v. Hartmann.

- ± Intent: permissible to present evidence of possession of firearms in a drug dealing prosecution as guns are typically associated with that crime

- ± Knowledge: in tax evasion case, prosecution could cross-examine the defendant about his acquaintances whom the government had convicted of tax evasion, United States v. Cardenas.

- ± Plan or Preparation: court permitted prosecution to present evidence of the defendant's bribe, a crime it had that not charged him with, to obtain a contract, United States v. Esquivel.

- ± Opportunity: prosecution permitted to show the defendant possessed items similar to those used in the crime, United States v. Walters.

- ± Modus Operandi: court allowed introduction of evidence that the defendant kidnaped little girls by asking them to help find a lost dog, Walters v. Maass.

- ± Identity: courts have approved the use of evidence of prior crimes where there is a unique, or "signature," characteristic, United States v. Sanchez.

- ± State of Mind: prior crimes are admissible to rebut a defense of insanity, or for proving "deliberation" or malice; for example, involvement in prior frauds is relevant to show state of mind in the current trial charging a scheme to defraud, United States v. Neely.

- ± Absence of Mistake or Accident: prior failure of the defendant to appear is admissible in a prosecution for failure to surrender to serve a sentence when the defendant claimed he made a mistake, United States v. Marion.

- ± Impeachment: court permitted evidence of the defendant's prosperity in a medicare fraud prosecution to rebut his claim of indigence, United States v. Lara.

- ± Membership in a Conspiracy: United States v. Aranda; United States v. Lehder-Rivas; United States v. Pitre.

- ± Predisposition: court allowed information about acts occurring after the charged offense to rebut the defense of entrapment, United States v. Stringer.

The rule does not limit admissibility to the above categories. It only prohibits the use of such evidence to show the propensity to commit a crime. The categories overlap and a piece of evidence might fit into several categories; (evidence of prior drug possessions and weapons arrests were relevant to show knowledge, motive, plan opportunity and intent United States v. Benbrook).

There is no requirement for the defendant to have been convicted or even arrested for the government to present prior bad acts evidence. The acts shown could have occurred before or after the crime for which the defendant is on trial, United States v. Osum; United States v. Ayers; United States v. Brown. In fact, a jury could have acquitted the defendant of the prior crime, Dowling v. United States, or the prosecution could have dismissed the charges, United States v. Arboleda. In any event, the judge may allow this evidence and instruct the jury to only consider the evidence for proving the intent, state of mind, opportunity, etc. The judge will instruct the jury to ignore any implications the prior bad acts may have on the defendant's character.

3. Prerequisite for Admission

As a prerequisite to the admissibility of 404(b) evidence, commonly called prior bad acts, a foundation must show the following:

a. the evidence is relevant

b. the jury could reasonably find by a preponderance that the act occurred and that the defendant committed the act, Huddleston v. United States.

c. the "bad act" is not unfairly prejudicial; (continual reference to defendant's prior drug use was not relevant and held to be prejudicial, United States v. Madden).

d. the "bad act" evidence is not too remote in time; (five year time frame was acceptable, United States v. Escobar; seven years was acceptable since the defendant was in prison for most of the time, Walters v. Maass).

4. Traits or Acts as Essential Elements

If evidence of another crime is necessary to establish an element of the present charge, there are no Rule 404(b) limitations, United States v. Blyden. For instance, in a trial for possession of a firearm by a felon, the government could show that the defendant was in a shootout with the police prior to his arrest, United States v. Daly. Many habitual offender statutes require the government to prove conviction of prior crimes. Rule 404(b) does not obstruct the government's case.

5. Sex Crimes - Limitations to Character or Prior Acts.

Rule 412 of the Federal Rules of Evidence prohibits the introduction of evidence of a sexual crime victim's prior sexual behavior in civil or criminal trials except under certain circumstances. This is often called a "rape shield" law in that the defense may not attack the victim's character.

Exceptions to Rule 412's prohibition are as follows:

a. the defense offers evidence of the victim's specific instances of sexual behavior to prove that the defendant did not cause the source of semen, injury or other physical evidence

b. the defense has offered evidence of specific instances of sexual behavior between the victim and defendant to prove consent or is offered by the prosecution

c. exclusion of the evidence would violate the defendant's constitutional rights

Other rules also govern the admissibility of character evidence as it relates to sexual activity. For instance, Rule 413 states that in a criminal trial for sexual assault, evidence of the commission of similar crimes of sexual assault by the defendant is admissible and may be considered for its bearing on any matter to which it is relevant. Rule 414 specifies that in a criminal trial for child molestation, evidence of the commission of similar crimes of child molestation by the defendant is admissible and may be considered for its bearing on any matter to which it is relevant. Rule 415 holds that in a civil trial seeking relief for the defendant's alleged sexual assault or child molestation, evidence of the defendant's commission of other offense involving sexual assault or child molestation is admissible as provided for in Rules 413 and 414.

6. Methods of Proving Character

Character evidence is admissible where it is an element of a charge, claim or defense. For example, the government may show the defendant's predisposition to commit a crime to rebut a claim of entrapment or prove the defendant is a career criminal subject to an enhanced sentence, United States v. Camejo; Donald v. Rast.

In a case where evidence of character, or a trait, is admissible, proof may be made by testimony as to reputation or in the form of opinion. However, the prosecution cannot ask the defendant's character witness if his opinion would change if he assumed that the defendant is guilty of the current charge, United States v. Mason. Such questions undermine the presumption of innocence, United States v. Long.

On cross-examination, the court will allow inquiry into relevant specific instances of conduct, United States v. Frost. The admission of evidence of specific instances of conduct to prove character is confined to cases in which character is strictly in issue. This occurs when a material fact of character determines the rights and liabilities of parties under the applicable law. If the character evidence the defendant sought to admit was not an essential element of a charge, claim, or defense, proof of character was limited to reputation or opinion evidence, United States v. Piche.

The rules only allow the use of opinion and reputation evidence as to truthfulness to impeach a prior witness's testimony. Evidence of a particular act, or of particular facts, tending to show untruthfulness, is not admissible for this purpose. Such questions cannot be asked on direct examination. The inquiry should relate to the witness's general reputation for truth and veracity in the community in which he lives (i.e., bad character for truthfulness). Usually this is done on rebuttal with other witnesses. This rule only applies to the defendant after he takes the stand to testify on his own behalf. The law treats a defendant that testifies as any other witness.

This rule provides that specific instances of a witness's conduct, for attacking his credibility, can be probed on cross-examination of the witness or on cross-examination of a witness who testifies to the character of the defendant. However, such inquiry is limited to “deceptive acts” affecting veracity. Examples of deceptive acts include perjury, check forgery, embezzlement and presenting false documents. Permissibility of asking about such acts is largely within the judge's discretion. The judge must determine that this inquiry’s probative value outweighs the possible unfair prejudicial effect on the jury.

III. PRIVILEGES

A. Concept of Privilege

IPO 2 - Identify when the four privileges recognized by the Federal Rules of Evidence may preclude a jury from receiving relevant evidence.

Rule 501 states that "the privilege of a witness, person, government, state, or political subdivision thereof shall be governed by the principles of the common law as they may be interpreted by the courts of the United States in the light of reason and experience." The rules as proposed originally by the Supreme Court were much more specific and enumerated specific privileges. However, Congress declined to accept the proposed rule and adopted Rule 501, a very broad and general rule.

The common law held that certain types of communications were the result of special relationships that were meant to be private. The importance to society of maintaining this privacy outweighed the importance of revealing the information that the parties communicated. These communications were deemed confidential between the communicating parties. Thus, if a communication is privileged, the party holding the privilege can preclude the other party from disclosing the communication.

Rule 1101(c) provides that the rule with respect to privilege (unlike the remainder of the rules) applies at all stages of all proceedings, i.e., whenever a witness is called upon to testify.

B. Types of Privileged Communications

There are four relationships recognized universally in the Federal courts as privileged. These are:

1. Attorney - Client
2. Husband - Wife

3. Psychotherapist/Psychiatrist/Licensed Social Worker in field of Psychotherapy - Patient, Jaffee v. Redmond.
4. Government - Informant

There are other privileges that are sometimes recognized by some courts:

1. grand jury proceedings
2. official secrets/executive privilege, Castle v. Jallah.
3. privilege against revealing surveillance techniques, United States v. Foster; (government did not have to reveal the location of hidden transmitter and means of transmission, United States v. Fernandez).
4. national security, In re Under Seal; Bowles v. United States
5. law enforcement investigatory privilege, Raphael v. Aetna Casualty & Surety Co.; United States v. Foster.
6. Freedom of Information Act information exempt from disclosure, Department of State v. Ray.

There are also relationships that generally are not recognized as privileged in Federal courts:

1. Doctor - Patient, Hancock v. Dodson, Whalen v. Roe; United States v. Moore.
2. Accountant - Client
3. Journalist - Source, In re Shain
4. Parent - Child, United States v. Ismail; In re Subpoena Issued to Mary Erato
5. Clergy - Communicant, though the privilege was recognized in the 3rd Circuit, In Re Grand Jury Investigation.

C. Attorney-client Privilege

Attorney-Client Privilege

1. Communication intended to be confidential
2. Communications were confidential
3. Attorney is acting in capacity of providing legal advice

Contrary to popular belief, not every communication between an attorney and the client falls under the attorney-client privilege. The privilege only applies to communications that the parties intend to be and are, in fact, confidential and made to the attorney who was acting in the capacity of an attorney at the time of the communication, United States v. Abrahams; United States v. Moscony. For the privilege to apply, the client must have consulted or employed the attorney to give legal advice, or represent the client in litigation, or perform another function as an attorney. The privilege covers corporate as well as individual clients, but it does not normally include the right by the attorney to withhold the name of a client. Nor does the privilege shield the attorney from disclosure of the identity of a person paying legal fees for a client if disclosure of the identity does not also disclose confidential communications, Vingelli v. United States; In re Grand Jury Proceedings.

Corporate counsel do not automatically represent all corporate employees. There must be some agreement between the employee and the attorney unless the employee is an officer/controlling manager of the business, United States v. Keplinger (the corporate counsel did not represent corporate manager employees since there was no express agreement for individual representation and the individuals did not ask the corporate counsel to represent them).

The privilege does not apply when the attorney only serves as a conduit for funds of the client. Attorneys frequently act as representatives in real estate transactions, stock sales and various other transactions where their principal functions are to handle the transfer of funds from one party to another. These are not strictly attorneys' functions since other professionals can perform them.

The privilege does not apply to business advice an attorney gives. This is especially important where the attorney acts as both attorney and accountant. When acting in this dual relationship, there is no attorney-client privilege for advice given as an accountant. The Federal courts do not recognize an accountant-client privilege.

When an attorney gives advice or renders assistance in planning, perpetrating or concealing a crime or a fraud, the attorney-client privilege does not attach. By taking part in a crime or a fraud, the attorney destroys any privilege that would otherwise attach to confidential communications, United States v. Inigo; United States v. Zolin; United States v. Davis; United States v. Aucoin. The attorney-client privilege also does not cover tangible items that a defendant gives to his or her attorney. The attorney is required to turn these items over to the authorities, In re Grand Jury Subpoena.

As with other privileges, the presence of a third party during the communication between an attorney and a client will usually destroy the privilege. The exception to this principle is if the third party acts on some behalf of the attorney to accomplish the tasks of a legal advisor. These third parties fall under what is called the "umbrella of the privilege" of the attorney. Included are such persons as a legal secretary taking notes at meetings between the attorney and the client, an investigator hired by the attorney to help obtain information, or even an accountant hired by the attorney for the client.

D. Husband-Wife Privileges

There are two different and distinct kinds of privileges involved in the Husband-Wife relationship, the confidential communication privilege and the testimonial privilege, Trammel v. United States. The confidential communication privilege operates in many ways just as the attorney-client privilege. Confidential communications (oral or written) between spouses during the marriage (special relationship) are

Spousal Privileges

Communications Privilege
and
Testimonial Privilege

privileged from disclosure even after divorce or death has ended the marriage. It is essential, however, that the spouses must have intended the communications to be confidential.

If it is obvious from the circumstances or nature of a communication that the spouses intended no confidence, there is no privilege, United States v. Marashi. For example, communications between husband and wife voluntarily made in the presence of their children, who are old enough to understand them, or of other members of the family, are not privileged, United States v. McConnell (2). Likewise, communications made in the presence of other third parties are not usually regarded as privileged.

The confidential communications privilege does not extend to communications made before the marriage or after divorce as there is no "special relationship" to protect, United States v. Jackson (2). Furthermore, this privilege applies only to communications and not to acts, unless the court finds the act (such as a gesture) was intended to be a confidential communication.

The second spousal privilege is the testimonial privilege and is sometimes called the spousal incapacity or spousal immunity privilege. In a criminal case, the witness spouse can exercise the testimonial privilege to refuse to testify against a defendant spouse. Thus, a spouse is competent to testify against the defendant spouse but cannot be compelled to do so. The rationale for the privilege is that marital harmony would be impaired if the spouses were forced to be adversaries in a criminal case. The testimonial privilege applies to relevant acts (observations by the testifying spouse) that occurred before or during the marriage.

Divorce terminates the privilege. There is no marriage to protect any further. An ex-spouse witness can be compelled to testify against the other party (the defendant) even if one or both of them object. However, if the proposed testimony concerns confidential communications made during the marriage, the communication privilege can apply.

Although the communication privilege survives the dissolution of the marriage (unlike the testimonial privilege), neither privilege applies under various circumstances. The privilege does not apply to sham or illegal marriages, United States v. Saniti, United States v. Lustig, United States v. Treff. The privilege does not attach to situations where the victim of the crime was a spouse or the child of either, United States v. Smith (1), United States v. Allery, United States v. White. According to some courts, crimes that both spouses commit terminate the privilege, United States v. Parker; United States v. Hill.

E. Psychotherapist - Patient

This privilege is not one of the original privileged areas found in common law. Its origin and development are entirely based on recent case law and statutory revision. The Supreme Court's opinion in Jaffee v. Redmond established the psychotherapist - patient privilege as a universally recognized privilege in the Federal courts.

Although there is little case law on the privilege, there are several guidelines concerning the relationship. The patient holds the privilege, and the ability to assert the privilege survives the patient. The scope of the privilege is limited to confidential communications between a psychotherapist and their patients during diagnosis or treatment, and the content of these communications cannot be compelled. The scope of the privilege is limited to the profession. Only those who are trained psychotherapists, such as psychiatrists, psychologists, or social workers licensed in the field of psychotherapy fall within the privilege. The privilege is absolute. The trial judge cannot engage in a balancing test to weigh the need for probative evidence against the confidentiality of the privileged communication.

F. Government-Informant Privilege

Unlike the other privileges recognized by federal courts, the government-informant privilege does not protect communications. This privilege allows law enforcement agencies to withhold the identity of persons who furnish information concerning violations of federal law. The purpose of the

privilege is the furtherance and protection of the public interest in effective law enforcement. The privilege recognizes the moral obligation of citizens to communicate their knowledge of the commission of crimes to law enforcement officials and, by preserving their anonymity, encourages them to perform that moral obligation.

The privilege is waived when the government puts the informant on the stand to testify. Where disclosure of an informant's identity is essential to the defense of an accused, the trial court can compel disclosure. If the government insists on withholding the identity, the court may dismiss the indictment.

Recognized Privileges under Federal Rules

T	Attorney-Client
T	Husband-Wife
T	Psychiatrist/Psychologist/Licensed Social Worker-Client
T	Government-Informant

The general rule is that the closer the informant is connected to the criminal activity, the greater the likelihood the court will require that identity be revealed. The court may require disclosure where the informant's identity is necessary, material, or helpful to the defense. Courts are compelled to command this information when it lessens the risk of false testimony or it is necessary to obtain other useful testimony, Hoffman v. Real; United States v. Dobynes. Courts also have a tendency to require disclosure if the informant was a participant or, on some occasions, a witness in the crime charged. Disclosure typically depends on the degree of participation, United States v. Singh.

There is a balance between the involvement of the informant and the likelihood of a court having to compel the identity. For instance, if the informant is---

1. a tipster (i.e., the source of the information) ---identity need not be revealed United States v. Bender.

2. the one who introduces the undercover agent to the defendant---identity need not be revealed.

3. a witness present during the crime--- the circuits are split on revealing identity, United States v. Sanchez; United States v. Jaramillo-Suarez; United States v. Mendoza-Salgado.

4. a participant in the crime (i.e., a significant presence)---identity revealed, United States v. Batista-Polanco.

5. identity is relevant and helpful to the defense---identity may be revealed, United States v. Martinez; United States v. Curtis.

Clearly, where "probable cause" is established by evidence apart from the informant's information, the court will not require disclosure of the informant's identity. Where probable cause is based upon information supplied by the informant, the trial judge, in his or her discretion, may require disclosure. Therefore, officers should corroborate probable cause with as much independent information as possible to reduce the risk that the court will command the identity of the informant, United States v. Brown (2).

IV. HEARSAY

A. Definition

Hearsay is information that does not come from the personal knowledge of the witness but from repetition of what the testifying witness has heard someone else say. As defined by Rule 801(c) "'Hearsay' is a statement, other than one made by the declarant while testifying at the trial or hearing, offered in evidence to prove the truth of the matter asserted."

Hearsay evidence is disfavored because:

the testimony of the witness does not come from personal knowledge

the jury cannot observe the demeanor of the declarant who had personal knowledge of the facts related in the statement

the possibility of distorting the statement when it is repeated

the fact that the declarant has not been examined under oath regarding the statement or made the statement under oath

the opposing counsel cannot effectively cross-examine the declarant regarding the statement, if the declarant is not also the testifying witness

The Sixth Amendment provides that a defendant shall have the right to confront and cross-examine the witnesses testifying against him. Hearsay evidence deprives the defendant these integral rights.

B. Statements That Are *Not* Hearsay

IPO 3 - Identify statements that are hearsay and statements that are not hearsay

If all a party is trying to prove is that the words *were spoken* rather than that they were true, then the statements are not hearsay. If the party is requesting that information in the statement to be accepted as fact, the statement may be hearsay. The defendant contends that he could not have threatened the victim because he had laryngitis that week. Any person who heard him speak to the victim could testify to what was said because the issue is not the truth of the statements made but whether the defendant could speak. To testify about what the defendant said is not hearsay.

Testimony about "verbal acts" is not hearsay. An example of a verbal act is where a person has handed an agent a sum of money and says, "This is for not testifying against my brother." Without those words the defendant could characterize the payment as a loan, a payback of a loan, a gift or many other things other than bribery. The words give the act the effect of bribery. As such, that statement is not hearsay.

The most important category of statements that are not considered hearsay, by Rule 801(d)(2), are statements "offered against a party and is (A) the party's own statement, in either an individual or representative capacity ..." This allows the government to introduce statements of criminal defendants against them at trial without having to call them as witnesses (which the Fifth Amendment precludes) or have the statements barred by the hearsay rule.

The Rules recognize non-hearsay statements into two categories of statements: those made by witnesses and those made by parties. Witnesses can be asked about their prior inconsistent statements. This rule allows the use of prior inconsistent statements for impeaching a witness as well as substantive evidence of the defendant's guilt, United States v. Patterson.

To be used as substantive evidence, the witness must have made the prior inconsistent statement under oath at a prior trial, hearing (including grand jury) or deposition, United States v. Owens; United States v. Lashmett; United States v. Odom. The response "I cannot remember" may be an inconsistent statement where the opponent can show that the witness does or should remember, United States v. Milton.

Prior statements by a witness are admissible to show that they are consistent with his or her testimony at trial. The rule allows prior statements of the witness to rebut a charge on cross-examination that the current testimony is the result of recent fabrication or improper influence or motive, United States v. Casoni. Prior consistent statements are admissible whether they are sworn or unsworn, oral or written, uttered in or out of court, (testimony of a girlfriend to corroborate defendant, United States v. Bolick); (officer's police report, Gaines v. Walker); (officer's police report identifying defendant at a drug buy after it was used on cross-examination of the officer,

United States v. Arias-Santana); (an agent's handwritten notes, United States v. Pena). To be admissible, the prior consistent statement must pre-date the existence of a motive to lie or fabricate a story, Tome v. United States.

The Rules allow the use of out-of-court identifications made by the witness to be testified to by someone else, if two conditions are met:

- The rule requires that at the time of trial the witness cannot or will not identify the defendant because of:
  - poor memory,
  - a change in appearance,
  - fear, or
  - a desire not to help in convicting the defendant.
- The out-of-court identification was made in the presence of the person who is to testify to it, United States v. Simmons.

The Rules provide other examples of statements that are not hearsay. Courts allow-

officers to explain a course of conduct (i.e., why the witness did something); United States v. Vizcarra-Porras; or explain the origin of the investigation, United States v. Martin

evidence to show that the statement was made, Martinez v. McCaughtry

evidence to show the witness had knowledge of facts, United States v. McIntyre

a statement introduced to prove the matter asserted is false (e.g., a letter introduced to show falsity of contents)

admission of statements to lay a foundation for observations

statements to show predisposition to commit a crime

a statement to show future intent of the declarant to do a certain thing

a statement introduced to show motive; United States v. Levine

a statement introduced to show state of mind; United States v. Levine; United States v. Williams

a statement offered as an explanation of an ambiguous act

a statement made to establish a foundation for a witness' opinion, United States v. Blackman

a statement made to explain a sequence of events, United States v. Payne

any statement made that is not an assertion, (imprint on a weapon "Made in Spain," United States v. Thody)

The Rules say that an admission is *not* hearsay. An admission is any statement or act of a party offered into evidence against that party. It may also be defined as a prior oral or written statement or act of a party that is inconsistent with the party's position at trial. Admissions may be oral, in writing or inferred by conduct.

An admission can, but does not have to, cover one or more elements of the crime. "I mailed the claim form to the government office seeking reimbursement under my contract with the government but I did not overcharge them." In a prosecution for filing a false claim or a mail fraud violation, this statement would be an admission but not a confession, Hancock v. Dodson.

A confession is a comprehensive statement of a person that the person is guilty of the crime charged. A confession embraces all the necessary elements of the offense. The statement may be made verbally or in writing, to a court, law enforcement officer or any other person.

All confessions must be corroborated to be admissible in a Federal criminal trial. The Federal Rules of Evidence treat confessions the same as admissions. Both are equally admissible against a party by way of the testimony of a witness that overheard the statement being made by the party.

Adoptive admissions are statements that someone has made other than the defendant but the defendant adopts as his own from his silence, United States v. Beckham.

The government must prove all four of the following for a statement to be an adopted admissible:

- **â** the defendant could hear the statement (or seen it, e.g., a letter)
- **ã** the defendant had the opportunity to respond to the statement.
- **ä** the statement was of the type that the defendant would have denied if it were not true
- **å** the defendant remained silent, United States v. Schaff.

If this occurs, the defendant is said to have adopted the statement of another as his own. For example, a "customer receipt" is indicia of possession of the premises where the receipt is found. Adoption of a writing may be inferred from possessing it, United States v. Paulino.

A lawyer who makes statements of fact in front of his client that are not denied, are admissible, United States v. McKeon; United States v. Ojala. However, statements made while plea bargaining are generally not admissible

as a rule. Adoptive admissions do not apply if the defendant is in custody or if Miranda warnings have been given and invoked. The defendant's Fifth Amendment protections guarantee the right to silence.

Representative statements are those that someone has made the defendant has authorized to speak for him or her. When authorized individuals make statements (attorneys, accountants, etc.) they are considered admissions of the defendant, such as the statements of defendant's attorney during closing arguments, United States v. Bentson.

Statements made in the scope of employment are not hearsay if they are made (1) during employment and (2) in the scope of employment. These statements are considered admissions by the defendant. The proposing party need not show that the employer authorized the employee to speak for the employer, United States v. Saks; United States v. Harris; United States v. Sanders.

Under federal conspiracy law, each conspirator is liable for the acts committed in furtherance of the conspiracy by any of the other conspirators. This doctrine applies to *statements* made by any conspirator during and in furtherance of the conspiracy. Any statements made by any conspirator are admissible against any of the other conspirators. Therefore, anyone having personal knowledge of such statements can testify about the statement at trial, whether the declarant is a defendant or not, Bourjaily v. United States; Maryland v. Craig; United States v. Perez.

Before a court will allow the introduction of a co-conspirator's statement against other conspirators, the government must establish the following three conditions

- there was a conspiracy of which the speaker was a member; United States v. Arvanitis; United States v. Mahkimetas; United States v. Rocha; (one who joins an ongoing conspiracy adopts the prior acts and declarations of co-conspirators, United States v. Mkhsian).

- **í** the statement was made during the conspiracy, United States v. Smith (3); (error to admit statements after declarant and co-conspirators have been arrested, United States v. Perez-Garcia).

- **î** the statement was made in furtherance of the conspiracy, United States v. McConnell; United States v. Smith.

Even if a statement does not qualify as a co-conspirator's statement, it may be admissible as a statement against interest, such as an expression of frustration over event, United States v. Williams (3).

Examples of co-conspiracy statements include statements made to-

- **T** recruit potential co-conspirators, control damage of an ongoing conspiracy

- **T** keep co-conspirators informed as to progress of the conspiracy, United States v. Hitow

- **T** conceal the criminal objectives (allowed in some circuits); United States v. Sollars

- **T** reassure, maintain trust, cohesiveness; United States v. Edmonson; United States v. Maldonado-Rivera

- **T** identify co-conspirators to each other

- **T** avoid punishment, such as threats to a witness, United States v. Triplett.

A confession or admission is used against the person who actually made the statement; all others (e.g., adoptive, representative, co-conspirator, etc.) are used against someone other than the person who made the statement.

C. Hearsay Rule Exceptions: Declarant Can Be Available

Rule 802 provides that "Hearsay is not admissible except as provided by these rules . . ." The rules provide various exceptions to Rule 802. Certain types of statements, although hearsay, are nonetheless admissible because, under the circumstances in which the statements were made, the information is felt to be trustworthy and reliable. In organizing the exceptions two categories of statements were created: (1) statements in which the availability of the original declarant (speaker) is not a pre-condition to the admissibility of the statement; and, (2) statements that will be admissible only when the original declarant is not available to testify.

IPO 4 - Identify statements that are exceptions to the hearsay rule.

Hearsay exceptions that exist despite the availability of the declarant include present sense impression, excited utterances, recorded recollection, records of regularly conducted business activity and public records.

A present sense impression is a statement describing an event or condition made while the declarant is perceiving the event or condition, or immediately thereafter. The theory of this exception is that the substantial contemporaneous nature of the statement and the event reduce the likelihood of deliberate misrepresentation by the declarant, United States v. Parker (2); (three days later was not contemporaneous, United States v. Cammisano).

Related to the present sense impression exception is the excited utterance exception. A statement relating to a startling event or condition made while the declarant was under the stress or excitement caused by the event or condition is admissible as an excited utterance. The trustworthiness of such

Declarant Available Exceptions
present sense impression
excited utterance
recorded recollection
business records
public records

Hearsay Exceptions

statements lies in their spontaneity. Therefore, the event must be startling enough to produce a spontaneous utterance without time to contrive or misrepresent. For example, when government agents are making entry into an apartment to serve a search warrant for stolen government computers, an occupant says, “I knew Joe (the defendant) would get caught if he kept those computers here.” Any of the officers that heard this statement could testify in court about the excited utterance.

The recorded recollection exception allows witnesses to refresh their memory with hearsay statements (reports) under certain circumstances. Occasionally, witnesses to an event cannot remember at trial what they saw or heard. Typically, these witnesses would be incompetent to testify. However, if a record was made at the time of the event, or soon thereafter, the witness may use that report to establish the events. The witness must be able to swear at the trial that the statement (record) accurately reflects what they perceived. Under these circumstances, the record may be read into evidence. They know this as a *past recollection recorded* and is an exception to the hearsay rule.

There is another legal doctrine known as *present memory refreshed* which should not be confused with this hearsay exception. For a present memory refreshed, the witness can recall the events in question after reviewing the witness' notes or some other document. In such cases, the witness is testifying from memory (even if refreshed with a hearsay document) and therefore there is no hearsay involved.

Records of regularly conducted business activity (business records) form a hearsay exception if they are made under conditions that provide assurances of accuracy. Records made in the ordinary course of business, or transmitted to the maker, by someone with personal knowledge and the duty to make an accurate record, are admissible. The witness may be anyone in the business who is familiar with the record system, preferably the custodian of the records. Business records are considered trustworthy principally because those with personal knowledge are under a strict and continuing duty to make accurate records for their business.

This hearsay exception is important for the introduction of computer evidence if the evidence fits the criteria for the "business records" exception. If the person testifying in support of the documents, while they need not be an *expert*, must have knowledge of the circumstances in which the computer record was made; (printout of INS computerized records, United States v. Hernandez); (credit card computer printout of records showing fraud, United States v. Goodchild); (motel registration card; money order receipt, United States v. McIntyre).

This rule has four basic requirements that must be met before a business record is admissible as an exception to the hearsay rule:

1. The record (i.e., memorandum, report, record, or data compilation, in any form) of the act, event, condition, opinion or diagnosis was made at or near the time of the event by a person with personal knowledge of the event, United States v. Muhammad.

2. The record was made and kept in the course of a regularly conducted business activity.

   - personal records do not qualify (a diary, checkbook, inventory of property)
   - one person can be a business (a desk calendar)
   - the business activity may be illegal (drug sale records)
   - the record need not have been made by the business through which it is offered ("insufficient funds" stamped on a check by a bank and returned to a business are records of that business, United States v. Hawkins)

3. It was the regular practice of that business activity to make and maintain such records, United States v. Jacoby; (this would exclude records made for trial, United States v. Blackburn).

4. The testifying witness (usually the custodian of records for that business) has knowledge of the first three requirements.

Public records also constitute a hearsay exception. These records are considered trustworthy because it is presumed that public servants perform their official tasks carefully without bias, prejudice or corruption. Public records can be certified, which means they are self-authenticating. Business records are not self-authenticating, requiring a keeper of the records to testify about their authenticity. The routine and contemporaneous requirements are not as crucial as with business records. This exception applies to all public office and agency records.

Public records may include activities of the office or agency, matters observed pursuant to a duty imposed by law about which there was a duty to report, factual findings resulting from an investigation made pursuant to authority granted by law (this is frequently used against the government because of internal investigations), and a lack of a record. Investigative reports by officers are excluded as Congress felt that there was the danger of them being self serving. However, a report prepared at the direction of a law enforcement agent is admissible if the government agency performs mechanical record keeping duties and simply provides law enforcement officers with computerized printouts of that information, United States v. Dudley; United States v. Wiley.

D. Hearsay Rule Exceptions: Declarant must Be Unavailable

These hearsay exceptions apply *only* when the declarant is *unavailable* to testify at trial. A person is unavailable when the declarant:

X is exempted by ruling of the court on the ground of privilege from testifying concerning the subject matter of the declarant's statement, United States v. Salerno.

X persists in refusing to testify concerning the subject matter of the declarant's statement despite an order of the court to do so, Jennings v. Maynard.

X testifies to a lack of memory of the subject matter of the declarant's statement

X is unable to be present or to testify at the hearing because of death or then existing physical or mental illness or infirmity, United States v. Donaldson.

X is absent from the hearing and the proponent of a statement has been unable to procure the declarant's attendance by process or other reasonable means; (depositions were not admissible when the government has not met its burden of demonstrating a good faith effort to find the witnesses, United States v. Fuentes-Galindo).

DECLARANT UNAVAILABLE
Former Testimony
Statement Against Interest
Catch-All Category

HEARSAY EXCEPTIONS

Former testimony qualifies as a hearsay exception. If a witness testified under oath and was subject to cross-examination at a previous proceeding involving substantially the same parties and issues and is now *unavailable*, that witnesses' prior testimony may be entered into evidence. For example, a deposition of a witness in Belgium was admissible when the witness refuses to come to the United States, United States v. Kelly.

A statement against interest is one in which at the time of its making is contrary to the declarant's pecuniary interest, or would subject the declarant to liability. The statement must be one that a reasonable person in the declarant's position would not have made unless he or she believed it to be true. A statement against interest should not be confused with an admission.

A statement against interest is one made by a *non-party* whereas an admission is made by a *party* (the government or defendant).

To prevent a criminal from easily procuring another person to "take the rap" for that person, a statement tending to expose the declarant to criminal liability and offered to exculpate the accused is not admissible unless corroborating circumstances clearly show the trustworthiness of the statement. To be admissible, the statement must meet several requirements. The first requirement is that the declarant is unavailable. Second, the declarant is not a party to the criminal charges. Third, the statement must have been against the declarant's proprietary, pecuniary, or penal interest at the time it was made.

There are some limitations to the admissibility of statements against interest. A statement admitting involvement in a lesser offense to avoid involvement in a more serious crime is not admissible, United States v. Edward. A statement by a person who knows he cannot be extradited to the United States is not admissible, United States v. Fowlie. If a statement is partially inculpatory and partially exculpatory, only the portion that is inculpatory is admissible against the defendant, Williamson v. United States. Statement against interest and co-conspirator statements could be similar -- but co-conspirator statements must occur during and in furtherance of the conspiracy; statement against interest could occur afterwards.

The catch-all exception to the hearsay rule allows the judge to admit some statements into evidence. The rationale is that if the statement seems trustworthy, it applies to a material fact, and the declarant is unavailable, admitting the statement would be in the best interest of justice. For example, admitting a shipping document relating to a stolen container of goods, United States v. Bachsian; or entries from a diary kept by the defendant's late wife, kept on the advice of her attorney after they were having marital problems, United States v. Treff, serve justice rather than an empty hearsay rule.

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Jaffee v. Redmond, 518 U.S. 1, 116 S.Ct. 1923 (1996)

Jennings v. Maynard, 946 F.2d 1502 (10th Cir. 1991)

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United States v. Arboleda, 929 F.2d 858 (1st Cir. 1991)

United States v. Arias-Santana, 964 F.2d 1262 (1st Cir. 1992)

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United States v. Benbrook, 40 F.3d 88 (5th Cir. 1994)

United States v. Bender, 5 F.3d 267 (7th Cir. 1993)

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United States v. Blackman, 904 F.2d 1250 (8th Cir. 1990)

United States v. Blakey, 960 F.2d 996 (11th Cir. 1992)

United States v. Blevins, 960 F.2d 1252 (4th Cir. 1992)

United States v. Blyden, 964 F.2d 1375 (3d Cir. 1992)

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United States v. Bradley, 5 F.3d 1317 (9th Cir. 1993)

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United States v. Brown, 923 F.2d 109 (8th Cir. 1991)

United States v. Brown (2), 3 F.3d 673 (3d Cir. 1993)

United States v. Camejo, 929 F.2d 610 (11th Cir. 1991)

United States v. Cammisano, 917 F.2d 1057 (8th Cir. 1990)

United States v. Campbell, 937 F.2d 404 (8th Cir. 1991)

United States v. Cardenas, 895 F.2d 1338 (11th Cir. 1990)

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United States v. Davis, 1 F.3d 606 (7th Cir. 1993)

United States v. Dobynes, 905 F.2d 1192 (8th Cir. 1990)

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United States v. Dudley, 941 F.2d 260 (4th Cir. 1991)

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United States v. Fowlie, 24 F.3d 1059 (9th Cir. 1994)

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United States v. Hartmann, 958 F.2d 774 (7th Cir. 1992)

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United States v. Hill, 967 F.2d 902 (3d Cir. 1992)

United States v. Hines, 955 F.2d 1449 (11th Cir. 1992)

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United States v. Jackson (2), 939 F.2d 625 (8th Cir. 1991)

United States v. Jacoby, 955 F.2d 1527 (11th Cir. 1992)

United States v. Jaramillo-Suarez, 950 F.2d 1378 (9th Cir. 1990)

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United States v. Lara, 956 F.2d 994 (10th Cir. 1992)

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United States v. Lehder-Rivas, 955 F.2d 1510 (11th Cir. 1992)

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United States v. Rojo-Alvarez, 944 F.2d 959 (1st Cir. 1991)

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GOVERNMENT EMPLOYEE RIGHTS

DESCRIPTION:

This 2-hour block of instruction examines the principles of search and seizure as they apply to government employees and their places of work. Such topics examined include the employee's ability to develop a reasonable expectation of privacy in his or her workplace, the legal requirements for overcoming that privacy, and the validity of consent granted by the employee's supervisor to search these areas.

TERMINAL COURSE OBJECTIVE:

Students will identify the legal requirements for intruding into a government employee's reasonable expectation of privacy in the workplace.

INTERIM PERFORMANCE OBJECTIVES:

1. Identify the circumstances in which a government employee has a reasonable expectation of privacy in the workplace environment.

2. Identify circumstances in which a government agent can intrude on the reasonable expectation of privacy of a government employee.

3. Identify the legal aspects of intruding into a government telephone system and e-mail system.

4. Identify the limitations of a supervisor's consent to search a government employee's work environment.

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GOVERNMENT EMPLOYEE RIGHTS

TABLE OF CONTENTS

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GOVERNMENT EMPLOYEE RIGHTS

I. INTRODUCTION

Government agencies are obligated to provide a degree of privacy protection to their employees that is not found in the private sector. This is a result of the federal Constitution and the obligations incurred by the federal government. The Constitution controls all federal government behavior, which includes the federal government-employee relationship.

The Fourth Amendment prohibits the government from engaging in unreasonable searches and seizures. Typically, law enforcement officers concern themselves with the particulars of this area of the law. But does the Fourth Amendment only apply to law enforcement officers in ferreting out criminal activity?

In a series of cases, the Supreme Court has answered no. The Supreme Court defines a search as anytime a government entity intrudes into a reasonable expectation of privacy, Katz v. United States. This definition, and thereby the Fourth Amendment, has been applied to public school officials, New Jersey v. T.L.O., firefighters, Michigan v. Tyler, and hospital officials, O'Conner v. Ortega.

II. WORKPLACE REP

A. Creation of REP

The Supreme Court acknowledges that persons must expect a lesser degree of privacy in their work environment than they would in other places, See v. Seattle, Mancusi v. DeForte. The workplace is typically one shared by many people that are there to complete the business of the organization. They often share offices, work areas and desks. Employees intermingle personal items and government property. Under such circumstances, creating a reasonable expectation of privacy is difficult for an employee.

However, creating a reasonable expectation of privacy in a workplace environment is possible. Certainly, employees maintain an expectation of privacy in the personal items they bring into the office environment. For example, employees expect their personal property found in gym bags, purses and travel luggage are beyond the intruding eye of either the public or their supervisor.

Employees can extend this expectation even into areas that the government owns. Employees use government desks, offices and lockers to store their personal items and, commonly, create a reasonable expectation of privacy in their use. A locker is an example of an area that is personal in nature and the government, through a supervisor or other employees, would have little need to intrude for work-related purposes. Without having any limitations placed on the use of a locker, this is an area in which an employee can develop a reasonable expectation of privacy.

IPO 1 - Identify the circumstances in which a government employee has a reasonable expectation of privacy in the workplace environment.

The same can be said for a government office or desk. The government traditionally gives these items to an individual employee for their use. Personal items are commonly placed in these areas and there is limited reason for other employees to intrude concerning their duties. The Supreme Court held that under such circumstances, an employee can develop a reasonable expectation of privacy, even in a government-owned property. O'Conner v. Ortega.

B. Destruction of REP

The Supreme Court recognized that employers design the workplace for the completion of an agency mission and does not serve the conventional purpose of providing personal privacy. G.M. Leasing Corp. v. United States. Therefore, courts consider the kind of work, the type of employee, the area searched, regulations, prior practices and privacy waivers.

Employees involved in the kind of work that engenders a great amount of secrecy, such as national interests, or the likelihood of government loss, such as at the United States Mint or the United States Postal Service, cannot make great claims of privacy. Similarly, courts have sustained intrusions into the work environment of law enforcement officers that would not stand against other government employees.

Perhaps the most important aspects of determining whether an employee has a reasonable expectation of privacy are the area that the government searches, agency regulation of the use of the area, and the agency's previous practices. Zones of privacy given to an employee by the government engender a reduced expectation of privacy. For instance, a government office, desk, filing cabinet or computer is not considered out-of-bounds for government intrusion. Likewise, areas that are routinely accessible by other members of an office, even though personally owned, are not ones in which an employee can expect to preserve private matters.

Prior government practices and regulations play a significant role in determining whether an employee has a reasonable expectation of privacy in a given area. The courts have been consistent in their holdings that if an employee has notice that certain areas are to be intruded upon (most notable through regulations) and is aware that these intrusions take place, no reasonable expectation of privacy can exist. However, where regulations exist that are unenforced, an employee may be able to create a reasonable expectation of privacy.

Routine inspections of government property destroy a reasonable expectation of privacy in those areas. The government has a right to control and moderate the use of its facilities and equipment and routinized inspection put the employees on notice that the government will intrude into those areas.

Occasionally, the government requests employees waive their right to privacy before turning over a piece of equipment or facility. For instance, it is common for an agency to provide locker amenities to employees but only if the employees acknowledge that the lockers are to be used for specific

purposes and are subject to inspection. Under these circumstances, some courts have held that the employees cannot, as a matter of law, develop a reasonable expectation of privacy, even absent routine inspections.

III. WORKPLACE INTRUSIONS

A. Office Searches

In the landmark case of O'Conner v. Ortega, the Supreme Court acknowledged that even if an employee can create a reasonable expectation of privacy, government agents (typically, supervisors) could enter these zones of privacy in conformity with the Fourth Amendment. The primary principle of the Fourth Amendment is that all government intrusions into reasonable expectations of privacy be reasonable. The Court found three government entries into workplace REP that would be reasonable.

First, the Court held that a standard workplace intrusion that is non-investigatory can reasonably occur if the intrusion is justified at its inception and be narrowly focused to find the item sought. This is best described as a search for office-related materials. Under these circumstances, the law requires no suspicion. Should evidence be found during a non-investigatory workplace intrusion, the plain view doctrine is in effect and such evidence is seizable.

IPO 2 - Identify circumstances in which a government agent can intrude on the reasonable expectation of privacy of a

The second type of intrusion permitted by a government supervisor into a workplace REP is allowing a supervisor to seek evidence of employee misconduct. To do so, a standard of reasonableness measures the supervisor's intrusion. Courts have often interpreted this standard to mean that the supervisor (or an agent of the supervisor) has developed reasonable suspicion of employee misconduct. The supervisor must reasonably relate the search to the circumstances that compelled the

supervisor into the office, desk, locker, etc. While engaged in an employee misconduct search, evidence of criminal activity found in plain view is admissible against the employee in a criminal proceeding.

The third type of search that the Supreme Court permitted in Ortega was that conducted to ferret out criminal activity. This search requires a warrant if it leads the supervisor or agent through an employee's reasonable expectation of privacy.

It is sometimes difficult to determine whether the supervisor intended to search for evidence of employee misconduct or criminal activity. Most evidence of criminal activity will also lend itself to evidence of employee misconduct. If a court determines that the mission of the government supervisor was to look for criminal evidence, a warrant is necessary. Obviously, many supervisors will want to conduct their intrusions with the least amount of suspicion necessary (reason to suspect employee misconduct). Courts will determine the intent of the government at the time of the intrusion. Important factors in this evaluation include the misconduct being investigated (is a criminal prosecution possible?), the government representative that conducted the search (a line supervisor or a criminal investigator), and whether the government sought a warrant. In cases in which a criminal prosecution is considered, it is best to proceed with a warrant.

B. Electronic Intrusions

Employers have taken a variety of measures to scrutinize the actions of their employees, to include bugging their offices, tapping their telephones and placing video cameras in work environments. With the use of each of these devices, the Fourth Amendment is applicable if the government has intruded on the employee's reasonable expectation of privacy.

IPO 3 - Identify the legal aspects of intruding into a government telephone system and e-mail system.

The Supreme Court held in Katz that the use of a bugging device to listen to a conversation in which the speaker has a reasonable

expectation of privacy is a search. This principle also applies to the work environment. Bugging an employee's office to listen to private conversation therein requires a Title III warrant, Shield v. Burge.

Likewise, employees can have private conversations on government telephones. Most employers recognize the utility in allowing an employee to make brief, personal phone calls while in the work environment. The use of a device to acquire the contents of workplace telephone conversations requires a Title III search warrant. An exception to this rule is if it is clear that the telephone used is monitored for a work-related purpose. For example, law enforcement officers could not assert a reasonable expectation of privacy on police telephones they knew (or should have known) were monitored, Jandak v. Village of Brookfield.

Many courts have approved the use of video cameras to record activity in open office areas. Their rational is that the employee has no reasonable expectation of privacy in these areas. Therefore, whatever means the employer chooses to monitor their activities in these areas is acceptable. However, placing video cameras in areas that the employee has a reasonable expectation of privacy is a search (such as an office) and may only be done with a warrant.

There is not a great deal of case law on the issue of government provided voice mail. However, it appears that employees have a reasonable expectation of privacy in voice mail systems that a password or other protections secure. Accessing voice mail was considered a violation of 18 U.S.C. § 2701 by at least one court, United States v. Moriarty. Section 2701(a) states that-

> *Except as provided in subsection (c) of this section whoever-*
>
> *(1) intentionally accesses without authorization a facility through which an electronic communication service is provided; or*

(2) intentionally exceeds an authorization to access that facility;

and thereby obtains, alters, or prevents authorized access to a wire or electronic communication while it is in electronic storage in such system shall be punished as provided in subsection (b) of this section.

C. Supervisory Consent

On occasion, criminal investigators attempt to obtain consent from employees' supervisors to search the employees' offices, desks, files, computers, etc. Under certain circumstances, this is acceptable. For instance, if the employee has no reasonable expectation of privacy in the area to be searched, he or she does not have standing to object to the intrusion. Standing is the legal principle that a party can only complain about the violation of a right if it was their right intruded upon, Rawlings v. Kentucky. If the employee does not have a reasonable expectation of privacy that is being intruded upon, he or she does not have a Fourth Amendment right to complain.

IPO 4 - Identify the limitations of a supervisor's consent to search a government employee's work environment.

If the area to be searched is shared by more than one person, any of those persons can give the government agent consent to search. The Supreme Court has authorized the use of third party consent in United States v. Matlock. Many office spaces, pieces of equipment, etc., are shared by several members of an office. Each has an expectation of privacy in that area, but not against each other's intrusions. Therefore, the law recognizes that any of them can give license to an investigator to intrude.

Supervisors cannot grant consent based on the single fact that they supervise the suspect. This does not create a power for that supervisor to intrude into the privacies of his or her employees. Supervisors must either share the area to be searched or the employee cannot establish an expectation of privacy at

in the area to be searched. Otherwise, the government investigator must obtain consent from the employee, rely on an exigency, or use the principles of O'Conner v. Ortega to sustain a workplace intrusion.

TABLE OF CASES

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ELECTRONIC COMMUNICATIONS

DESCRIPTION:

This 2-hour block of instruction examines federal statutes governing the interception of electronically transmitted and stored communications.

TERMINAL COURSE OBJECTIVE:

Students will identify the federal law governing the use of interception of electronic communications.

INTERIM PERFORMANCE OBJECTIVES:

1. Identify the elements of 18 U.S.C. § 2510, et. seq.

2. Identify types of equipment and office devices which are contemplated in 18 U.S.C. § 2510, et. seq.

3. Identify when an interception of electronic communications is covered by Title One of the 1986 Electronic Communications Privacy Act.

4. Identify when a communication becomes “stored communications,” and how it may be seized as evidence.

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ELECTRONIC COMMUNICATIONS

TABLE OF CONTENTS

ELECTRONIC COMMUNICATIONS

I. HISTORY OF ELECTRONIC COMMUNICATIONS

The purpose of this legal text is to give an overview of federal law regarding interception of wire, oral and electronic communications, and electronic tracking devices. This text does not cover agency policy regarding such interception activity. Each agent is strongly urged to become familiar with agency policy regarding these matters, and govern him or herself accordingly.

A. Wiretapping (Interception of communications transmitted over a wire.)

In 1928, the Supreme Court decided the first case that involved wiretapping, Olmstead v. United States. Although this case involved Fourth Amendment issues, it was the first to have wiretapping implications. Federal Prohibition Agents investigated a liquor conspiracy in the State of Washington. Federal agents, without court orders, wiretapped telephones located in the homes of four of the conspirators. None of the agents ever physically entered onto the property of the suspects. They conducted the wiretaps at locations off the defendants' premises at telephone poles owned by the telephone company. Stenographers wrote down what the conspirators said during their telephone conversations. This evidence was admitted at trial over the objections of the defense. As a result, the government convicted more than eighty defendants.

Olmstead was a defendant whose conversations agents overheard through the wiretapping activities. After his conviction, he appealed to the United States Supreme Court on Fourth Amendment grounds. Olmstead argued that the agents should have had either his consent or a search warrant to lawfully overhear his conversations. The Supreme Court held that no violation of Olmstead's rights had occurred. The Court reasoned that the Fourth Amendment was intended to protect a person's property rights. Since none of the agents had intruded on the private property of any defendant, the Fourth Amendment had not been offended. The Court upheld the convictions. In light of our modern concept of privacy and the Fourth Amendment, this seems obviously incorrect. Nonetheless, this decision was the basic concept

of Fourth Amendment protection for thirty-nine years, until the Court decided Katz v. United States, discussed below.

The involvement of eavesdropping on telephone conversation to gather evidence of a crime was a novel concept to the Court of 1928. After all, Alexander Graham Bell had only invented the telephone in 1876, and it had not been in widespread use for a very great time. There had been no statutes passed to regulate or control eavesdropping. Further, the Supreme Court had only created the exclusionary rule fourteen years before, and the Court was still grappling with all the implications of the Fourth Amendment as it related to physical searches. In considering both emerging ideas of Fourth Amendment law, the Court recognized that Congress should pass a law relating to eavesdropping on seemingly private conversations.

Congress enacted the Federal Communications Act of 1934. This Act expressly forbade intercepting the communications of another and divulging the contents thereof. The statute was intended to prevent anyone, including law enforcement officers, from engaging in wiretapping under any circumstances. Even if officers possessed a search warrant, any communications on the phone were not admissible at trial. This applied to Federal officers and state officers. The Court did allow exceptions to this law: consent of a party to the conversation, telephone company checks for maintenance, and matters of national security.

From 1934 until 1968, Congress made many attempts to amend the law to allow some form of court authorized wiretap surveillance. These attempts were unsuccessful for different reasons, and left law enforcement officers without this effective tool of investigation. A major catalyst for change in the law occurred in 1967 when the United States Supreme Court rendered the landmark decision of Katz v. United States.

In Los Angeles, California, the Federal Bureau of Investigation was investigating the involvement of Katz in interstate wagering operations. Katz used the interstate telephone lines to relay wagering information from Los Angeles to Miami violating Federal law. Agents learned that Katz often used a certain public telephone for this purpose. The agents were aware that the

1934 Federal Communications Act prohibited wiretapping but did not contemplate other methods of eavesdropping. Therefore, instead of listening to both sides of the conversation with a wiretap, the agents placed a sensitive microphone (commonly known as a “bug”) on the outside of the top of the telephone booth. This microphone could hear Katz' half of the conversations. The agents recorded Katz discussing wagering information from Los Angeles to Boston and Miami. The agents gathered enough evidence for a grand jury to indict Katz. At trial, Katz argued that the agents had violated his Fourth Amendment rights when they listened to his conversations. The trial court reasoned that in light of Olmstead the search was valid since the agents had not intruded onto Katz's private property and allowed his convicted to stand.

The United States Supreme Court reversed Katz' conviction, and in so doing, changed the focus of Fourth Amendment protections to privacy rights. The Court rejected the previous holding that Fourth Amendment rights were related to a person's property. Instead, the Court said that the Fourth Amendment was intended to protect a person's privacy rights whether on private property or in public. The Court set out a two-pronged test to determine whether a person has a right to expect a reasonable amount of privacy in any given situations. First, does the person in question exhibit by word or deed a present demand for privacy? Second, is the privacy demanded a reasonable one that the community is prepared to grant? If the defendant meets these two criteria, he or she has demonstrated a reasonable expectation of privacy.

Comparing the facts of the Katz case to this test, the Court found that Katz demanded privacy by closing the door of the telephone booth, thereby meeting the criteria for the first part of the test. The Court then observed that this was a reasonable privacy request, one that the community was prepared to grant. Katz thus met the second requirement of the test, and the Court found that he had a reasonable expectation of privacy in his conversations. The FBI needed a warrant to intrude on Katz’s conversations.

The Court also said that anything exposed to the public, even when in a private area, has no Fourth Amendment protection. Thus, if Mr. Katz had spoken

loud enough for an agent to hear him outside the telephone booth, he would not have a reasonable expectation of privacy in his comments.

In 1968, Congress passed the Omnibus Crime Control and Safe Streets Act. Title III of that Act, codified in 18 U.S.C. § 2510 et. seq., changed the laws regarding the gathering and use of wiretap evidence in court. Under this statute, law enforcement officers can use evidence gathered by electronic surveillance at trial for certain criminal violations if the officers first obtain a court order authorized under this statute. This became known as a "Title III court order." In 1986, Congress enacted the "Electronic Communications Privacy Act" (ECPA) which amended Title III. The ECPA had only one title. Thus, since this amendment, it is legally correct to refer to this topic as "Title I" activities, or a "Title I" court order. From now on, this text will call these matters "Title I." Understanding that the concepts and activities are the same is important, no matter which reference is used.

Congress made it a federal crime for anyone to violate this law, including law enforcement officers. Further discussion regarding the violations and the exceptions in the law are covered later in this text.

B. Bugging (Interception of Oral Statements Not Transmitted Over Wire)

IPO 1 - Identify the elements of 18 U.S.C. § 2510, et. seq.

Before the Omnibus Crime Control and Safe Streets Act, there was no federal statute regulating the interception of oral conversations of suspects. However, the Fourth Amendment did cover interceptions of oral conversations (popularly called "bugging"). Before the Katz decision, the Fourth Amendment permitted bugging if the officers did not trespass on or into the suspect's premises. At that time, the law reflected the Olmstead decision. If an intrusion were not made onto or into the suspect's premises, no search occurred. For example, a device placed against the wall of an adjacent office separating agents and the suspects was held to be lawful.

Agents had permission to be in the office, and no wiretap was involved, Goldman v. United States.

However, if officers made any intrusion into the suspect's premises, the law required a warrant or consent; (the Court held that a 5/16 inch spike mike bored into an air duct creating a super-microphone effect was intruding beyond where agents could lawfully go, and therefore was not lawful without a search warrant or consent Silverman v. United States); (the Court held that a thumbtack length mike bored into a wall between agents and suspects was not lawful without consent or a search warrant, Clinton v. Virginia).

On the other hand, just as in wiretapping, the Supreme Court held that if a party to an oral conversation consented to the conversation being recorded, no warrant was required; (the Court held that where the suspect invited an informer, who was wearing a body listening device, into his premises, the informer was present by consent of the suspect, and the informer was consenting to the monitoring, no warrant was required, On Lee v. United States).

IPO 2 - Identify types of equipment and office devices which are contemplated in 18 U.S.C. § 2510, et. seq.

Congress included bugging in the Omnibus Crime Control and Safe Streets Act of 1968. The law established criminal violations for illegal bugging but set up procedures which officers could follow to obtain evidence, (e.g., Title I court order, or with consent of one party. In situations where there is no reasonable expectation of privacy no procedures are required for the intercept).

For the first time, statutory regulation shifted from simply conversations carried by means of wire circuits to a broader concept. Congress was attempting to protect privacy in the communication or exchange of ideas between a sender and a recipient from outside interception.

C. Domestic and Foreign Intelligence Surveillance

1. Domestic Intelligence

In 1972, the Supreme Court held that the President could not bypass the Fourth Amendment by authorizing warrantless wiretaps involving domestic security. United States v. United States District Court. Here, the government charged a defendant with bombing an office of the Central Intelligence Agency in Michigan. Warrantless wiretaps had been approved by the President via the Attorney General, and the government intercepted some of the defendant's conversations. The defendant asked the court to review the wiretaps to decide if the government had obtained any evidence illegally. The Court held that the wiretaps were illegal without warrants. Therefore, electronic surveillance regarding domestic security must follow the requirements of Title I.

2. Foreign Intelligence

In 1978, Congress enacted the Foreign Intelligence Surveillance Act. The law allows certain warrantless surveillance when a foreign power is solely involved. The law prescribes procedures for obtaining warrants for surveillance when a United States citizen is involved. The FBI uses this statute and is beyond the scope of this course.

D. Electronic Communications (Transfer of information or idea by wire, radio, electromagnetic, photoelectronic or photooptical means)

In 1986, by enacting the Electronic Communications Privacy Act (ECPA), Congress amended 18 U.S.C. § 2511 et.seq., to include the more advanced types of communications, such as:

1. Electronic Mail.

This involves such technology as electronic mail (e-mail) systems operated through computer systems. These have proliferated in the last few years in both government agencies and in the private sector. Additionally, there are countless web pages operated by private enthusiasts that have electronic mail capability. Several large commercial information companies such as CompuServe, America Online, and Prodigy are providing an ever growing international opportunity for electronic contact between people.

> IPO 3 - Identify when an interception of electronic communications is covered by Title One of the 1986 Electronic Communications Privacy Act.

2. Computer Data Transmission.

This technology provides a different purpose than electronic mail, though similar in delivery. An example of non e-mail transmission of data is an account information transfer between banks and other commercial enterprises. While different from an electronic "letter" sent between friends, this type of data exchange is nonetheless included in the act.

3. Video Teleconferencing.

Some major companies are taking advantage of video teleconferencing technology. To save costs, organizations use this technology to hold staff meetings. By using this tool, executives can communicate face-to-face, use visual aids and the other positive aspects of a personal meeting. Since there is the exchange of information in these circumstances, the ECPA protects this communication.

4. Cellular Phones.

The use of this advanced, convenient technology has become widespread. The user has a fully functional telephone in his or her pocket and can reach every other telephone in much of the world. These telephones are duplex

radio transmitter/ receivers that transmit conversations to and receive from regional towers, called a "cell." Congress specifically included these telephones in Title I. They are designed and intended to provide private communications, and application of the ECPA is an attempt to insure that privacy.

5. Cordless Telephones

Cordless telephones are unlike cellular telephones in many ways. One important aspect is that a cordless phone is a low power, short range device that must be near its base unit. The operator must plug this base unit into the modular telephone jack like an ordinary telephone. While not previously protected in its entirety, the Communications Assistance for Law Enforcement Act of 1994 amended the ECPA so that all aspects of cordless telephones are now protected fully.

6. Digital Display and Voice Paging Devices.

Both devices are nothing more than radio receivers that can receive communications sent by transmitters. Although these are one way communications devices, Title I applies as information is communicated within the transmission.

7. Tone Only Paging Devices

Tone only paging devices transmit no information other than a tone alert. These pagers were the first type available, and were not sufficiently sophisticated to communicate ideas, other than the obvious one. The person so contacted was simply alerted to call a prearranged number.

8. Beepers and Transponders.

Beepers are correctly called mobile tracking devices, and are used to follow the movement of such things as automobiles and containers by triangulation. Transponders are much more sophisticated devices designed to allow air traffic control radar to track the presence and movements of aircraft. These

devices will be covered below. The ECPA does not cover their use as they do not transmit information within its communication.

9. Video Surveillance by Law Enforcement.

This is surveillance by use of a video camera that has no audio capability (by use of a "deaf" camera). The statute is silent on this issue, but there has been some court intervention (see below).

10. General Public Communications

The Communications Assistance For Law Enforcement Act of 1994 amended the definition of "readily accessible to the general public" in 18 U.S.C. § 2510(16) relating to radio communications to exclude "an electronic communication." Congress apparently intended this to extend coverage to radio-to-radio communications in which the parties encrypt or encode (or take some other reasonable step) to protect such transmissions. Common types of radio transmissions such as police dispatch or car-to-car, fire department transmissions, ship-to-shore transmissions, and common transmissions sent or heard on citizens band radio are not protected by this statute.

E. Video Surveillance by Government Agents

Video-only surveillance is not mentioned in 18 U.S.C. § 2510, et.seq., but has been governed by Fourth Amendment principles since the Katz decision. If a person exposes their activity to the public, they cannot claim a reasonable expectation of privacy. The person or activity may lawfully be observed by law enforcement officers and the person or activity may be memorialized on film or video tape. No warrant is required in this circumstance.

If that person or activity is located in a private area and not exposed to the public, then a reasonable expectation of privacy exists. A search warrant is required to intrude into the privacy area to install the equipment and to record the person or activity. Additionally, there is a trend among some circuits to extend certain Title I type requirements to video-only surveillance. The

Second, Fifth, Seventh, Ninth, and Tenth Circuits have borrowed some elements from Title I that relate to and satisfy the particularity requirement of the Fourth Amendment.

Specifically, these Circuits require (1) a showing that other investigative techniques will be unproductive or are too dangerous; (2) a description of the events related to the suspected crime that are likely to be obtained; (3) a limited term of surveillance (such as 30 days); and (4) a procedure for minimizing the observation of events not related to the crime. United States v. Biasucci, United States v. Cuevas-Sanchez, United States v. Torres, United States v. Mesa-Rincon.

F. Governmental Access to Stored Communications.

IPO 4 - Identify when a communication becomes "stored communications," and how it may be seized as evidence.

At the time Congress was drafting the ECPA as an amendment to Title III, Congress attempted to address all available technology to which this protection was applicable. As a result, 18 U.S.C. § 2701, et.seq., was also enacted to deal with communications that are not in the process of being conveyed from one person to another, but which are stored in some fashion. Access to e-mail is the primary example. These stored communications are not subject to the same requirements for seizure as electronic communications if they are not being intercepted in the process of transfer.

If a communication has been stored for one hundred eighty days or less, the storage "container" (typically, the e-mail service provider) may be lawfully searched and the government may seize the communication under the authority of an ordinary search warrant. When stored communications are seized pursuant to a search warrant, no notification is required by the government to the suspect. Further, the government may obtain a court order delaying for an appropriate time any notice by the provider of the storage service to the suspect.

If a communication has been stored for more than one hundred eighty days, the government may require its disclosure by means of a grand jury subpoena, a trial subpoena, or an administrative subpoena. Additionally, disclosure may be compelled by a court order. When one of these means is used, prior notice by the government to the suspect is required, unless the court authorizes a delay in the notification. Delay is possible if the government can show that prior notice will have an adverse effect, such as danger to life or safety, flight, destruction or alteration of evidence, intimidation of potential witnesses, or other serious jeopardy to an investigation or delay of trial. A similar delay of notice order may be obtained to prevent the provider of the service from notifying the suspect. In any case, government agents may seize a stored communication if they have the valid consent of either the originator, the addressee or the intended recipient.

When using a court order or subpoena to obtain the contents of electronic communications held in storage 181 days or more, a governmental agency may include a requirement in the order or subpoena that the service provider creates a backup copy of the contents. This is intended to protect the information from alteration or destruction by the suspect.

The Communications Assistance to Law Enforcement Act of 1994 amended 18 U.S.C. § 2703 concerns the disclosure of electronic transactional data. 18 U.S.C. § 2703 provides that electronic communications service providers or remote computer services shall disclose under subpoena or court order, "the name, address, telephone toll billing records, telephone number or other subscriber number or identity, and length of service of a subscriber to or customer of such service and the types of service the subscriber or customer utilized . . ."

This is not sufficient to get the toll numbers themselves, however. In order for the government to get access to toll records they must obtain a court order in which they must offer "specific and articulable facts showing that there are reasonable grounds to believe that the contents of a wire or electronic communication, or the records or other information sought are relevant to an ongoing <u>criminal</u> investigation."

G. Department of Justice Prosecutorial Policy

Before enactment of the law in 1968, Congress held public hearings into the matter of electronic surveillance. As a result of those hearings, Congress found that by far the most frequent incidents occurred among certain groups. Those were spouses involved in domestic relations disputes, industries conducting business espionage, political figures and parties spying on each other, and law enforcement officers.

In an effort to curb violations of the law, the Department of Justice (DOJ) established a policy of prosecutorial priority. First, to ensure that the enforcers of the law not be its violators, law enforcement officers at all levels will receive the greatest prosecutorial interest. The next group DOJ stated would receive its attention were those considered to be professionals. Professionals include private detectives, moonlighting telephone company employees, suppliers of surveillance equipment, and lawyers. The rest of the DOJ list, in order of prosecutorial preference, included those who spy on each other (such as politicians, industries, and business persons attempting to gain advantage over each other), spouses in domestic relations, and finally, all others not in the aforementioned groups.

II. VIOLATIONS OF TITLE I

A. Title 18 U.S.C. § 2511

Paraphrasing in relevant part, this code section says as follows:

> Except as otherwise specifically provided in this chapter any person who-
>
> _____
>
> > intentionally intercepts (or endeavors to intercept or procures any other person to intercept or endeavor to intercept)

any wire, oral, or electronic communication;

_____

intentionally uses or endeavors to use or procures any other person to use or endeavor to use any electronic, mechanical, or other device to intercept any oral communication when-

such device is affixed to, or otherwise transmits a signal through, a wire, cable, or other like connection used in wire communication; or

such device transmits communications by radio, or interferes with the transmission of such communication; or

such person knows, or has reason to know, that such device or any component thereof has been sent through the mail or transported in interstate or foreign commerce; or

such use or endeavor to use (A) takes place on the premises of any business or other commercial establishment the operations of which affect interstate or foreign commerce; or (B) obtains or is for the purpose of obtaining information relating to the operations of any business or other commercial establishment the operations of which affect interstate or foreign commerce; or

such person acts in the District of Columbia, the Commonwealth of Puerto Rico, or any territory or possession of the United States;

_____

intentionally discloses (or endeavors to disclose) the illegally obtained contents of any wire, oral, or electronic communication, knowing or having reason to know that the information was obtained through the interception of a wire, oral, or electronic communication in violation of this subsection; or

—————————————

intentionally uses (or endeavors to use) the illegally obtained contents of Any wire, oral, or electronic communication, knowing or having reason to know that the information was obtained through the interception of a wire, oral, or electronic communication in violation of this subsection;

shall be punished as provided in subsection (4) or shall be subject to suit as provided in subsection (5).

(Violations of the elements above are separate violations, and each one can result in separate penalties.)

B. Electronic Surveillance Equipment

Title 18 U.S.C. § 2512 prohibits the possession, sale and transfer of some electronic surveillance equipment. Anyone who intentionally sends through the mail, or sends or carries in interstate commerce, or makes, assembles, possesses or sells or even advertises any electronic, mechanical, or other device knowing that it is primarily useful for the surreptitious interception of wire, oral or electronic communications is guilty of a felony offense.

There are exceptions to this statute, however. Communications common carriers, such as telephone companies, must be allowed the use and possession of such equipment to install and maintain telephone equipment and service to the public. In addition, it is not a violation of this statute for officers, agents or employees of the United States, any State, or political subdivision thereof, when in the normal course of the activities thereof to possess, use, mail, assemble, or sell or even send or carry through interstate commerce such devices. Section 2512 does not prohibit the possession of a device whose design is <u>not primarily</u>

useful for surreptitious interception even though such devices or equipment could be used for surreptitious interception.

C. 18 U.S.C. § 2515 Prohibition of use of illegally intercepted wire or oral communication as evidence of crime.

> *Whenever any wire or oral communications has been intercepted, no part of the contents of such communication and no evidence derived therefrom may be received in evidence in any trial, hearing, or other proceeding in or before any court, grand jury, department, officer, agency, regulatory body, legislative committee, or other authority of the United States, a State, or a political subdivision thereof if the disclosure of that information would be in violation of this chapter.*

Since the provisions of §2511 et.seq. prohibit disclosing or using the illegally obtained contents of oral, electronic, or wire communications, this section is an effective bar to any use whatsoever of such communications unless it is lawfully possessed.

However, the 6th Circuit created a "clean hands" doctrine similar in theory to the "private search" exception to the Fourth Amendment. A wife had placed a recording device on the home and family business telephones unbeknownst to the husband. After a contested divorce, she reviewed the tapes and discovered her husband accepting a bribe from a local dairy owner for influence in awarding the lunchroom contract to that dairy. She reported this matter to police, gave them the taped conversation, and the husband was convicted. The 6th Circuit held that the evidence was admissible since law enforcement did not cause the interception, United States v. Murdock. But be aware that only one circuit that has so ruled. Agents are strongly urged to turn over to the United States Attorney's Assistant any such intercepted communications for a determination of legality.

III. AUTHORIZED TITLE I ACTIVITIES

A. Title I Court Order

Title I law allows federal agents (and state or local officers if state statutes permit) to obtain Title I court orders permitting them to lawfully intercept wire and oral conversations if the interceptions are related to certain enumerated crimes. The statute sets forth the procedures and requirements for such a warrant application. These requirements are much more exacting than for an ordinary search warrant. Each Title I application must be carefully reviewed and discussed with the Assistant United States Attorney before any steps are taken. Additionally, agency policy may place further restrictions on agents. Careful review of agency policy is also mandatory.

A provision was made in the code to punish those who would give suspects notice that they are the target of an electronic search. This is codified in 18 U.S.C. § 2232(c), which states:

> *Whoever, having knowledge that a Federal investigative or law enforcement officer has been authorized or has applied for authorization under chapter 119 to intercept a wire, oral, or electronic communication, in order to obstruct, impede, or prevent such interception, gives notice or attempts to give notice of the possible interception to any person shall be fined under this title or imprisoned not more than five years, or both.*

B. No Reasonable Expectation of Privacy in Oral Conversation

Evidence obtained through oral conversations can be lawfully heard and recorded if the person speaking had no reasonable expectation of privacy in the conversation. When a person is present at home, for example, and has an oral conversation with another person present, there is an expectation of privacy in that conversation with respect to an outside eavesdropper.

Conversely, statements made in a public place where the speaker knows or should know that others lawfully present will hear do not have an expectation of

privacy. Some examples are a person speaking to an audience, two people having a conversation in a room where others are standing next to them, and a person using a telephone and speaking loud enough that others nearby can hear any comments. There is no expectation of privacy in conversations overheard from any place when the hearer is in a location the hearer has a right to be and where the hearer uses only the unaided ear. Further, there is no privacy expectation in conversations overheard in a location where the speakers have no authority to be (e.g., burglars recorded while in someone's home).

There is no expectation of privacy in conversations which take place when the speaker is under arrest and in either a police car, United States v. McKinnon, in a room of a police station, or while in prison, unless the conversation is with an attorney.

C. Surveillance by a Non-Law Enforcement Officer

Under federal Law, anyone may record their own conversation with others as if he or she is not making that recording for the purposes of committing a crime or a tort. In cases where a person has recorded their own conversations, and these conversations come lawfully into the possession of law enforcement officers, the conversation may be used in the government's prosecution.

For instance, officers arrest a suspect in a conspiracy. The suspect confesses and hands the officers a box of tape recordings made by the suspect. The tapes are recordings of the suspect's conversations with the co-conspirators. In response to questioning by the agents, the suspect states that the recordings were made so that if the suspect were harmed by the other conspirators, family members would know what happened. These recordings most likely will be admissible at trial under this exception to Title I. United States v. Truglio, United States v. Tzakis.

D. Communication Common Carrier - Title 18 U.S.C. § 2511(2)(a)

The law provides that communication common carriers (telephone companies) may, incident to the protection of company property and rendition of service, monitor calls made on their equipment. An example is an operator who

examines a telephone line to determine if there is an ongoing conversation or if the line is out of order. The operator can enter a conversation as well to inform one of the conversants that an emergency call is forthcoming. Repair personnel frequently monitor lines briefly to diagnose and repair equipment malfunctions.

Officers, employees, or agents of the Federal Communications Commission while in the normal course of their employment and while discharging monitoring responsibilities provided for by statute may intercept wire, oral, or electronic communications. Such information intercepted may be disclosed as well, Title 18 U.S.C. § 2511(2)(b).

E. Extension Telephones for Certain Businesses - Title 18 U.S.C. § 2510(5)(a)

Certain businesses have telephone companies install extension phones for the explicit purpose of listening to employees who have frequent contact with customers. The law permits this quality control purposes, and is most often done with the advance knowledge by the employees involved. Managers are allowed to listen in on conversations that pertain to business matters, but not to personal calls made by employees.

IV. CONSENSUAL UNDERCOVER CONTACTS

A. Consent - Title 18 U.S.C. § 2511(2)(c)

Title 18 U.S.C. § 2511(2)(c) states that it shall be lawful under this chapter for a person acting under color of law to intercept a wire, oral, or electronic communication where such person is a party to the communication or one of the parties to the communication has given prior consent to such interception. Consent to listen in or record must be voluntary, and the burden of proof of that consent is on the government. Physical threats or threats to prosecute for nonexistent crimes nullifies any consent. There are other circumstances which would render consent involuntary as well. Consent must be obtained before any monitoring is begun.

The law enforcement officer is not required to be present when the consensual monitoring occurs. An informant may record the his or her conversations for an officer under this exception. For example, an informant enters a suspect's premises bearing a concealed monitoring device. If the informant consents to the monitoring and/or recording, the act is legal.

The equipment for monitoring and recording or transmitting an intercepted oral conversation is not required to be physically on the person of the consenting party. For example, the suspect routinely searches everyone with whom criminal matters are discussed. Agents in this case may install the monitoring devices in the suspect's premises under the authority of an ordinary search warrant. But agents may not monitor these devices until the consenting party is actually present, and must stop monitoring when the consenting party leaves the conversation, even if the departure is temporary.

B. The Fourth Amendment

A suspect has no REP that a person the suspect talks to will not reveal the conversation later at trial. There is only an expectation of privacy if both parties demand it as against others not acknowledged to be privy to the conversation. But if one party to the conversation decides to reveal, the other party cannot claim any privacy that would prevent such revelation, Hoffa v. United States. The courts have also held that a suspect has no reasonable expectation that a person the suspect talks to will not record the conversation and later introduce the tapes at trial.

A suspect has no reasonable expectation that a person the suspect talks to will not transmit the conversation to an agent possessing a receiver to hear the conversation. The agent can testify at trial even if the informer is unavailable for trial, On Lee v. United States; United States v. White. This is true even if the suspect has invited the informant into the suspect's home, Lewis v. United States

If a suspect converses with another party and conveys evidence of a crime, the suspect does so at his or her own peril. As long as the other party does not join in the suspect's claim of privacy, but instead voluntarily exposes the

conversation to law enforcement, then the privacy protection is lawfully breached.

C. The Fifth Amendment

Suspects not coerced to engage in conversations are not compelled to be witnesses against themselves. The Fifth Amendment's protections focus specifically on compelled statements. Suspects not in custody are not required to be informed of their rights applicable under the decision of Miranda v. Arizona.

D. The Sixth Amendment

In many instances, law enforcement officers can make undercover contact with suspects after a crime has been completed. The Sixth Amendment right to counsel does not attach until the defendant has been indicted, an information has been issued, or has been presented to a magistrate for initial appearance. From that point forward, however, any contact with the suspect about the same crime, undercover or otherwise, is illegal and any evidence obtained thereby is inadmissible.

E. Protection of Equipment and Techniques From Disclosure or Discovery by Defense.

A series of United States Circuit Court of Appeals cases recognize an emerging qualified privilege of the government to refrain from disclosing sensitive investigative techniques. The courts initially applied this privilege to the disclosure of observation posts used in visual surveillance. The federal courts have now extended this privilege to include the nature and location of electronic surveillance equipment.

> *The government asks us to recognize a privilege not to disclose the location and type of equipment used in surveillance unless the defendant demonstrates that such information is relevant and helpful to the defense . . . We recognize a qualified governmental privilege not to disclose sensitive investigative*

> *techniques . . . We hold that the privilege applies equally to the nature and location of electronic surveillance equipment. Disclosing the precise locations where surveillance devices are hidden or their precise specifications will educate criminals regarding how to protect themselves against police surveillance. Electronic surveillance is an important tool of law enforcement, and its effectiveness should not be unnecessarily compromised. Disclosure of such information will also educate persons on how to employ such techniques themselves, in violation of Title I.* United States v. Van Horn; see also United States v. Green, United States v. Fernandez, United States v. Cintolo, United States v. Angiulo.

To require the government to disclose the nature, location, and use of electronic surveillance equipment would quickly lessen its effectiveness and, in some instances, jeopardize the safety of law enforcement officers. Courts have recognized the privilege of protecting investigative techniques. However, this privilege is not absolute and requires a balance between the interests of the government and criminal defendants. It is like any other common law privilege and has developed in response to legitimate concerns. The privilege should be accepted by remaining courts as it is argued and asserted.

F. Beepers And Transponders

Beepers are devices that are used to trace the movements of objects, people, and mobile conveyances. These devices transmit only a regular, intermittent tone. They reveal their location at any one time by triangulation, which requires surveillance teams. While not a Title I consideration, the Fourth Amendment does apply in some circumstances. These devices may be installed on the outside of any mobile conveyance when that installation is accomplished in a public place. They may be installed in objects which are the property of law enforcement, or with the permission of the owner at the time. Additionally, their movements may be freely monitored while moving in public.

If officers need to install a device inside the target's property (an automobile, for example) or need to enter the target's property to install the device, a search

warrant is needed. If officers monitor the tone while the beeper device is located in areas of privacy (inside a warehouse, for instance) then a search warrant is necessary. The request for such an order must show: 1) a description of the object in which the beeper is to be placed; 2) the circumstances which lead agents to request the installation of the beeper; and 3) the length of time that the surveillance is to be conducted. United States v. Karo.

Transponders are far more sophisticated devices which are commonly found installed in aircraft. These devices are designed to communicate automatically with air traffic control radar to show the identity and position of the aircraft. Certain messages can be transmitted by the pilot by selecting one of a series of four digit codes, each of which has a prearranged meaning. Since use of these devices requires hard wiring into the aircraft's electrical system, and the use of specific antennas, they are not often surreptitiously installed by agents. For units already installed in aircraft, there is no REP in such transmissions, since these transmissions are designed to be heard by radar operators.

G. Pen Registers and Trap and Trace Devices

The Electronic Communications Privacy Act compels law enforcement officers to obtain a court order (not a Title I court order) to utilize a pen register or trap and trace device. Pen registers are devices which record or decode electronic or other impulses which identify the numbers dialed or otherwise transmitted on a telephone line. These devices are useful to learn which telephone numbers a suspect is dialing.

Trap and Trace devices capture the incoming electronic or other impulses which identify the originating number of a device from which a wire or electronic communication was transmitted. These devices enable agents to learn the numbers of telephones from which calls are originated and directed to the suspect's telephone.

Pen registers and trap and trace devices are not covered by Title I because no interception of communication occurs, United States v. New York Telephone Co.. This information is excellent for investigative leads. A Federal district

judge may order the telephone company to assist law enforcement in the installation and use of such devices via All Writs Act, 28 U.S.C. § 1651.

H. Elements of 18 U.S.C. § 3121

Title 18 U.S.C. § 3121 provides in part:

> *Except as provided in this section, no person may install or use a pen register or a trap and trace device without first obtaining a court order under section 3123 of this title or under the Foreign Intelligence Surveillance Act of 1978.*

There are exceptions which are explained in the remainder of the statute: the telephone company or other service providers are excepted in order to be able to test, operate or maintain its equipment, and to protect the property rights of its customers. A court order for such installation is valid if it contains the following: the identity, if known, of person to whom line is leased; the identity, if known, of the criminal suspect; the number and, if known, physical location of the telephone line; and a statement of the offense involved.

If the applicant so desires, a request for an order to the phone company to furnish information, facilities, and technical assistance may be included in the application for this order. Additionally, the court can order the telephone company not to disclose the existence of the order and the fact of the investigation to any person. Such orders are not to exceed 60 days; however, time extensions of up to 60 days can be authorized by the court upon application showing cause for the requested extension.

The Communications Assistance for Law Enforcement Act of 1994 has amended this statute concerning pen registers as follows:

> *A government agency authorized to install and use a pen register under this chapter or under State law, shall use technology reasonably available to it that restricts the recording or decoding of electronic or other impulses to the dialing and signaling information utilized in call processing.*

In including this language in the 1994 Act, Congress is moving to prohibit the capture of other data beyond actual call processing codes or impulses. Before this act became law, PIN numbers, account numbers and other data directed at automated answering systems could be captured lawfully.

TABLE OF CASES

United States v. Mesa-Rincon, 911 F.2d 1433 (10th Cir. 1990)

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